

The
NORTH CAROLINA
REGISTER

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INFORMATION ABOUT THE NORTH CAROLINA REGISTER AND ADMINISTRATIVE CODE

NORTH CAROLINA REGISTER

The *North Carolina Register* is published twice a month and contains information relating to agency, executive, legislative and judicial actions required by or affecting Chapter 150B of the General Statutes. All proposed administrative rules and notices of public hearings filed under G.S. 150B-21.2 must be published in the Register. The Register will typically comprise approximately fifty pages per issue of legal text.

State law requires that a copy of each issue be provided free of charge to each county in the state and to various state officials and institutions.

The *North Carolina Register* is available by yearly subscription at a cost of one hundred and five dollars (\$105.00) for 24 issues. Individual issues may be purchased for eight dollars (\$8.00).

Requests for subscription to the *North Carolina Register* should be directed to the Office of Administrative Hearings, P. O. Drawer 27447, Raleigh, N. C. 27611-7447.

ADOPTION AMENDMENT, AND REPEAL OF RULES

The following is a generalized statement of the procedures to be followed for an agency to adopt, amend, or repeal a rule. For the specific statutory authority, please consult Article 2A of Chapter 150B of the General Statutes.

Any agency intending to adopt, amend, or repeal a rule must first publish notice of the proposed action in the *North Carolina Register*. The notice must include the time and place of the public hearing (or instructions on how a member of the public may request a hearing); a statement of procedure for public comments; the text of the proposed rule or the statement of subject matter; the reason for the proposed action; a reference to the statutory authority for the action and the proposed effective date.

Unless a specific statute provides otherwise, at least 15 days must elapse following publication of the notice in the *North Carolina Register* before the agency may conduct the public hearing and at least 30 days must elapse before the agency can take action on the proposed rule. An agency may not adopt a rule that differs substantially from the proposed form published as part of the public notice, until the adopted version has been published in the *North Carolina Register* for an additional 30 day comment period.

When final action is taken, the promulgating agency must file the rule with the Rules Review Commission (RRC). After approval by RRC, the adopted rule is filed with the Office of Administrative Hearings (OAH).

A rule or amended rule generally becomes effective 5 business days after the rule is filed with the Office of Administrative Hearings for publication in the North Carolina Administrative Code (NCAC).

Proposed action on rules may be withdrawn by the promulgating agency at any time before final action is taken by the agency or before filing with OAH for publication in the NCAC.

TEMPORARY RULES

Under certain emergency conditions, agencies may issue temporary rules. Within 24 hours of submission to OAH, the Codifier of Rules must review the agency's written statement of findings of need for the temporary rule pursuant to the provisions in G.S. 150B-21.1. If the Codifier determines that the findings meet the criteria in G.S. 150B-21.1, the rule is entered into the NCAC. If the Codifier determines that the findings do not meet the criteria, the rule is returned to the agency. The agency may supplement its findings and resubmit the temporary rule for an additional review or the agency may respond that it will remain with its initial position. The Codifier, thereafter, will enter the rule into the NCAC. A temporary rule becomes effective either when the Codifier of Rules enters the rule in the Code or on the sixth business day after the agency resubmits the rule without change. The temporary rule is in effect for the period specified in the rule or 180 days, whichever is less. An agency adopting a temporary rule must begin rule-making procedures on the permanent rule at the same time the temporary rule is filed with the Codifier.

NORTH CAROLINA ADMINISTRATIVE CODE

The North Carolina Administrative Code (NCAC) is a compilation and index of the administrative rules of 25 state agencies and 38 occupational licensing boards. The NCAC comprises approximately 15,000 letter size, single spaced pages of material of which approximately 35% of is changed annually. Compilation and publication of the NCAC is mandated by G.S. 150B-21.18.

The Code is divided into Titles and Chapters. Each state agency is assigned a separate title which is further broken down by chapters. Title 21 is designated for occupational licensing boards.

The NCAC is available in two formats.

- (1) Single pages may be obtained at a minimum cost of two dollars and 50 cents (\$2.50) for 10 pages or less, plus fifteen cents (\$0.15) per each additional page.
- (2) The full publication consists of 53 volumes, totaling in excess of 15,000 pages. It is supplemented monthly with replacement pages. A one year subscription to the full publication including supplements can be purchased for seven hundred and fifty dollars (\$750.00). Individual volumes may also be purchased with supplement service. Renewal subscriptions for supplements to the initial publication are available.

Requests for pages of rules or volumes of the NCAC should be directed to the Office of Administrative Hearings.

CITATION TO THE NORTH CAROLINA REGISTER

The *North Carolina Register* is cited by volume, issue, page number and date. **1:1 NCR 101-201, April 1, 1986** refers to Volume 1, Issue 1, pages 101 through 201 of the *North Carolina Register* issued on April 1, 1986.

FOR INFORMATION CONTACT: Office of Administrative Hearings, ATTN: Rules Division, P.O. Drawer 27447, Raleigh, North Carolina 27611-7447, (919) 733-2678.

NORTH CAROLINA REGISTER



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Publication Schedule
(January 1992 - December 1992)

| Issue Date | Last Day for Filing | Last Day for Electronic Filing | Earliest Date for Public Hearing | Earliest Date for Adoption by Agency | Last Day to Submit to RRC | * Earliest Effective Date |
|------------|---------------------|--------------------------------|----------------------------------|--------------------------------------|---------------------------|---------------------------|
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| 01/15/92 | 12/20/91 | 12/31/91 | 01/30/92 | 02/14/92 | 02/20/92 | 04/01/92 |
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| 02/14/92 | 01/24/92 | 01/31/92 | 02/29/92 | 03/15/92 | 03/20/92 | 05/01/92 |
| 03/02/92 | 02/10/92 | 02/17/92 | 03/17/92 | 04/01/92 | 04/20/92 | 06/01/92 |
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| 12/01/92 | 11/06/92 | 11/13/92 | 12/16/92 | 12/31/92 | 01/20/93 | 03/01/93 |
| 12/15/92 | 11/24/92 | 12/01/92 | 12/30/92 | 01/14/93 | 01/20/93 | 03/01/93 |

* The "Earliest Effective Date" is computed assuming that the agency follows the publication schedule above, that the Rules Review Commission approves the rule at the next calendar month meeting after submission, and that RRC delivers the rule to the Codifier of Rules five (5) business days before the 1st business day of the next calendar month.

IN ADDITION

[G.S. 120-30.9H, effective July 16, 1986, requires that all letters and other documents issued by the Attorney General of the United States in which a final decision is made concerning a "change affecting voting" under Section 5 of the Voting Rights Act of 1965 be published in the North Carolina Register.]

U.S. Department of Justice
Civil Rights Division

JRD:MAP:NT:lrj
DJ 166-012-3
92-0356

Voting Section
P.O. Box 66128
Washington, D.C. 20035-6128

March 24, 1992

Kenneth R. Hoyle, Sr., Esq.
Lee County Attorney
P. O. Box 1968
Sanford, North Carolina 27331-1968

Dear Mr. Hoyle:

This refers to the realignment of voting precincts, the establishment of an additional precinct and polling place in Lee County, North Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your submission on January 28, 1992.

The Attorney General does not interpose any objection to the specified changes. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41).

Sincerely,

John R. Dunne
Assistant Attorney General
Civil Rights Division

By:

Gerald W. Jones
Chief, Voting Section

IN ADDITION

This Section contains public notices that are required to be published in the Register or have been approved by the Codifier of Rules for publication.

**STATE OF NORTH CAROLINA
ENVIRONMENTAL MANAGEMENT COMMISSION
POST OFFICE BOX 29535
RALEIGH, NORTH CAROLINA 27626-0535**

PUBLIC NOTICE OF INTENT TO ISSUE STATE GENERAL NPDES PERMITS

Public notice of intent to issue State National Pollutant Discharge Elimination System (NPDES) General Permits for Point Source Discharges associated with the following activities:

1. NPDES General Permit No. NCG500000 for the point source discharge of non-contact cooling waters, cooling tower blowdown water, cooling system condensate, boiler water blowdown water, and other similar discharges.
2. NPDES General Permit No. NCG510000 for the point source discharge of treated groundwaters associated with the remediation of petroleum contaminated groundwaters and other similar discharges.
3. NPDES General Permit No. NCG520000 for the point source discharge of wastewater associated with sand dredging operations and other similar discharges.
4. NPDES General Permit No. NCG530000 for the point source discharge of wastewaters associated with the rinsing and packing of seafood and fresh water fish; and discharges from fish farms and other similar discharges.
5. NPDES General Permit No. NCG540000 for the point source discharge of domestic wastewater associated with single family residences and other similar discharges.
6. NPDES General Permit No. NCG550000 for the point sources discharge of wastewaters associated with the treatment of surface and groundwaters for either human consumption, industrial process or agricultural needs and other similar discharges.

On the basis of preliminary staff review and application of Article 21 of Chapter 143 of the General Statutes of North Carolina, Public Law 92-500 and other lawful standards and regulations, the North Carolina Environmental Management Commission proposes to issue State NPDES General Permits for the discharges as described above.

INFORMATION: Copies of the draft NPDES General Permits and Fact Sheets concerning the draft Permits are available by writing or calling:

Mr. Donald Safrit, P.E., Supervisor
Permits and Engineering Unit
Water Quality Section
N.C. Division of Environmental Management
P.O. Box 29535
Raleigh, North Carolina 27626-0535

Telephone (919) 733-5083

Persons wishing to comment upon or object to the proposed determinations are invited to submit their comments in writing to the above address no later than May 31, 1992. All comments received prior

IN ADDITION

to that date will be considered in the final determination regarding permit issuance. A public meeting may be held where the Director of the Division of Environmental Management finds a significant degree of public interest in any proposed permit issuance.

The draft Permits, Fact Sheets and other information are on file at the Division of Environmental Management, 512 N. Salisbury Street, Room 925-A, Archdale Building, Raleigh, North Carolina. They may be inspected during normal office hours. Copies of the information on file are available upon request and payment of the costs of reproduction. All such comments and requests regarding these matters should make reference to the draft Permit Numbers:

| | |
|-----------|--|
| NCG500000 | Cooling Water Systems |
| NCG510000 | Groundwater Remediation Systems |
| NCG520000 | Sand Dredging Operations |
| NCG530000 | Seafood Packing and Rinsing Operations |
| NCG540000 | Single Family Residences |
| NCG550000 | Water Treatment Systems |

Date: March 23, 1992

George T. Everett, Director
Division of Environmental Management

IN ADDITION

**STATE OF NORTH CAROLINA
ENVIRONMENTAL MANAGEMENT COMMISSION
POST OFFICE BOX 29535
RALEIGH, NORTH CAROLINA 27626-0535**

PUBLIC NOTICE OF INTENT TO ISSUE STATE GENERAL NPDES PERMITS

Public notice of intent to issue State National Pollutant Discharge Elimination System (NPDES) General Permits for Point Source Discharges of Stormwater associated with the following activities:

I. NPDES General Permit No. NCG080000 for the point source discharges of stormwater runoff from vehicle maintenance areas, including vehicle rehabilitation, mechanical repairs, painting, fueling, lubrication and equipment cleaning operations areas, associated with industrial activities classified as Local and Suburban Transit and Interurban Highway Passenger Transportation [Standard Industrial Classification Code (SIC 41)], Motor Freight Transportation and Warehousing (SIC 42) [except Public Warehousing and Storage (SIC 4221-4225)], Postal Service (SIC 43), and Petroleum Bulk Stations and Terminals (SIC 5191) with total petroleum site storage capacity of less than 1 million gallons, except as specified below. Also included in this permit are stormwater discharges from oil water separators associated with petroleum storage facilities with less than 1 million gallons total petroleum site storage capacity and associated with vehicle maintenance operations at activities which are otherwise designated on a case-by-case basis as being required to be permitted, except as excluded below.

Exclusions from Coverage:

- a. Vehicle maintenance areas associated with industrial activities classified as Railroad Transportation (SIC 40), Water Transportation (SIC 44), and Transportation by Air (SIC 45), and stormwater discharges from oil water separators associated with Petroleum Bulk Stations and Terminals (SIC 5191) with a total petroleum site storage capacity of greater than or equal to 1 million gallons.
- b. Discharges of wash water from steam cleaning operations or other equipment cleaning operations.

2. NPDES General Permit No. NCG130000 for the point source discharges of stormwater runoff associated with industrial activities classified as establishments primarily engaged in the wholesale trade of non-metal waste and scrap (hereafter referred to as the non-metal waste recycling industry) a portion of SIC 5093. This General Permit is applicable to stormwater discharges from areas at the facilities described above which are directly related to the industrial activities. Also included in this General Permit are stormwater discharges from areas at the facilities described above which are used for vehicle maintenance activities. The following activities shall not have coverage under this General Permit: establishment primarily engaged in the wholesale trade of metal waste and scrap, iron and steel scrap, and nonferrous metal scrap, and establishment primarily engaged in automobile wrecking for scrap.

On the basis of preliminary staff review and application of Article 21 of Chapter 143 of the General Statutes of North Carolina, Public Law 92-500 and other lawful standards and regulations, the North Carolina Environmental Management Commission proposes to issue State NPDES General Permits for the discharges as described above.

INFORMATION: Copies of the draft NPDES General Permits and Fact Sheets concerning the draft Permits are available by writing or calling:

Ms. Coleen Sullins, Supervisor
Stormwater Group
Water Quality Planning
N.C. Division of Environmental Management
P.O. Box 29535
Raleigh, North Carolina 27626-0535

Telephone (919) 733-5083

IN ADDITION

Persons wishing to comment upon or object to the proposed determinations are invited to submit their comments in writing to the above address no later than May 15, 1992. All comments received prior to that date will be considered in the final determination regarding permit issuance. A public meeting may be held where the Director of the Division of Environmental Management finds a significant degree of public interest in any proposed permit issuance.

The draft Permits, Fact Sheets and other information are on file at the Division of Environmental Management, 512 N. Salisbury Street, Room 625-C, Archdale Building, Raleigh, North Carolina. They may be inspected during normal office hours. Copies of the information on file are available upon request and payment of the costs of reproduction. All such comments and requests regarding these matters should make reference to the draft Permit Numbers NCG080000, or NCG130000.

Date: March 25, 1992

George T. Everett, Director
Division of Environmental Management

PROPOSED RULES

TITLE 10 - DEPARTMENT OF HUMAN RESOURCES

Notee is hereby given in accordance with G.S. 150B-21.2 that the Medical Care Commission (Division of Facility Services) intends to amend rules cited as 10 NCAC 3H .0705 and .0709.

The proposed effective date of this action is August 1, 1992.

The public hearing will be conducted at 9:30 a.m. on June 12, 1992 at the Council Building, Room 201, 701 Barbour Drive, Raleigh, NC 27603.

Reason for Proposed Action: To bring time interval of physician's visits in line with federal regulations and make those visits the same interval as the renewal of orders.

Comment Procedures: Written comments should be submitted to Jackie Sheppard, 701 Barbour Drive, Raleigh, North Carolina 27603 by June 11, 1992. Oral comments may be given at the hearing.

CHAPTER 3 - FACILITY SERVICES

SUBCHAPTER 3H - RULES FOR THE LICENSING OF NURSING HOMES

SECTION .0700 - PHYSICIAN SERVICES

.0705 POLICIES AND PROCEDURES

(a) Each licensed facility shall have policies and procedures which are implemented to assure that the medical or health care of each patient or resident is under the continuing supervision of a physician. Physician services shall include at least those physician services required in Section .0300 of this Subchapter.

(b) Medical orders for all medications and treatments administered to any patient or resident shall be signed and dated by the attending physician. All medical current orders shall be reviewed renewed, signed and dated by the physician at least every 60 days, quarterly. All medical orders for controlled substances shall be reviewed at least monthly with the physician. Such review may be done by telephone. All reviews shall be documented and dated in the medical record.

(c) A physician's oral orders (including telephone orders) shall be given only to a licensed nurse except orders for therapeutic diets which

shall be given either to a qualified dietitian or licensed nurse. The record of each telephone order shall include the name of physician giving the order, date and time of order, content of order and name of person receiving the order. The physician who gives oral orders shall sign the orders within five days and/or in accordance with the facility's written policies.

(d) Standing orders shall be identified for each patient and signed by the physician.

(e) All discharge orders and instructions shall be signed by a physician.

Statutory Authority G.S. 131E-104.

.0709 DOCUMENTATION

Physicians shall maintain appropriate clinical records as required of the physician in Rule .0609 of this Subchapter, including documentation of a physician visit to the patient by progress notes written at least every 90 days and a discharge summary which includes the patient's or resident's prognosis, final diagnosis or cause of death.

(a) The physician's shall visit every 60 days in the nursing facility.

(b) Every physician's visit shall be documented with an entry in the physician's notes which is descriptive of the resident's condition and response to treatment.

(c) Physicians shall complete discharge summaries as required by Rule .0609 of this Subchapter.

Authority G.S. 131E-104; 42 U.S.C. 1396 r (a).

* * * * *

Notee is hereby given in accordance with G.S. 150B-21.2 that the Commission for Mental Health, Developmental Disabilities and Substance Abuse Services intends to amend rules cited as 10 NCAC 14K .0103, .0210, .0315 and 14M .0410.

The proposed effective date of this action is August 1, 1992.

The public hearing will be conducted at 1:00 p.m. on May 28, 1992 at the Sheraton Inn Raleigh, President's Room, 4501 Creedmoor Road at Crabtree Valley Mall, Raleigh, NC.

Reasons for Proposed Actions: All rules in 14K are core licensure rules that apply to mental health, developmental disabilities and substance abuse services.

PROPOSED RULES

10 NCAC 14K .0103 - DEFINITIONS. *Definition No. (34) "Early Intervention Services" is proposed for amendment to add more specificity to the definition regarding transportation for infant/toddler early intervention services.*

In 1986 the Division adopted by reference the federal definition for this service. It is felt to be somewhat vague and open ended. With the addition of transportation services to the listing of required early intervention services, effective 8/1/92, a definition more relevant to State needs and available resources is appropriate. The proposed revision meets the federal requirements and will allow for more accurate fiscal planning at the State and local levels.

Other proposed changes in this Rule are for consistency and new requirements for APA filing.

10 NCAC 14K .0210 - LICENSE RENEWAL. *Proposed amendment due to absence of statutory authority to require sanitation inspections except in facilities which provide room or board. Subsequently, area programs will not be subjected to such inspections and local sanitarians will not be called to provide such.*

10 NCAC 14K .0315 - TREATMENT/ HABILITATION PLANNING AND DOCUMENTATION. *Proposed for amendment for the inclusion of language which documents that the client participated in the development of the individual treatment/habilitation plan. This language was inadvertently deleted in a previous revision to the Rule.*

This rule applies only to group homes for children with mental retardation or other developmental disabilities.

10 NCAC 14M .0410 - PARTICIPATION OF THE FAMILY OR LEGALLY RESPONSIBLE PERSON. *Proposed for amendment to allow reports to the parent or legally responsible person to be in writing or take the form of a conference. The reports shall focus on the child's progress toward meeting individual goals. This revision will also make the rule consistent with specialized community residential centers for individuals with mental retardation or other developmental disabilities.*

Comment Procedures: Any interested person may present his comments by oral presentation or by submitting a written statement. Persons wishing to make oral presentations should contact Charlotte Tucker, Division of Mental Health, Developmental Disabilities and Substance Abuse Services, 325 North Salisbury Street, Raleigh, N.C. 27603, (919) 733-4774 before May 16, 1992. Comments submitted as a written statement must be sent to the above address by May 16 and must state the rules to which the comments are ad-

dressed. Time limits for oral remarks may be imposed by the Commission Chairman. Fiscal information on these rules is also available from the same address.

CHAPTER 14 - MENTAL HEALTH: GENERAL

SUBCHAPTER 14K - CORE LICENSURE RULES FOR MENTAL HEALTH: MENTAL RETARDATION AND OTHER DEVELOPMENTAL DISABILITIES: AND SUBSTANCE ABUSE FACILITIES

SECTION .0100 - GENERAL INFORMATION

.0103 DEFINITIONS

(a) This Rule contains the definitions that apply to all the rules in this Subchapter and Subchapters 14L through 14O of this Chapter.

(b) In addition to the definitions contained in this Rule, the terms defined in G.S. 122C-3 also apply to all the rules in this Subchapter and Subchapters 14L through 14O of this Chapter.

(c) The following terms shall have the meanings specified:

(1) "Administering medication" means direct application of a drug to the body of a client by injection, inhalation, ingestion, or any other means.

(2) "Adolescent" means a minor from 13 through 17 years of age.

(3) "Adult" means a person 18 years of age or older or a person under 18 years of age who has been married or who has been emancipated by a court of competent jurisdiction or is a member of the armed forces.

(4) "Aftercare" means those services provided to substance abuse clients after discharge from a service which facilitates the client's integration or reintegration into society. Activities may include self-help groups, supportive work programs and staff follow-up contacts and interventions.

(5) "Alcohol abuse" means psychoactive substance abuse which is a residual category for noting maladaptive patterns of psychoactive substance use that have never met the criteria for dependence for that particular class of substance (criteria delineated in DSM-III-R published by the American Psychiatric Association, 1400 K Street, N.W., Washington, D.C. 20005 at a cost of twenty-nine dollars and ninety-five cents (\$29.95) for the soft cover edition and thirty-nine dollars and ninety-five cents (\$39.95) for the hard cover edition.) This adoption by reference is in accordance with G.S.

~~150B 14(e)~~, includes subsequent amendments and editions of the referenced material.

(6) "Alcohol dependence" means psychoactive substance dependence which is a cluster of cognitive behavioral, and physiologic symptoms that indicate that a person has impaired control of psychoactive substance use and continues use of the substance despite adverse consequences (criteria delineated in DSM-III-R published by the American Psychiatric Association, 1400 K Street, N.W., Washington, D.C. 20005 at a cost of twenty-nine dollars and ninety-five cents (\$29.95) for the soft cover edition and thirty-nine dollars and ninety-five cents (\$39.95) for the hard cover edition.) This adoption by reference ~~is in accordance with G.S. 150B 14(e)~~, includes subsequent amendments and editions of the referenced material.

(7) "Applicant" means any person who intends to establish, maintain or operate a licensable facility and who applies to the Department for a license to operate a facility under the provisions of G.S. 122C, Article 2.

(8) "Approved supported employment conversion plan" means a planned approach to changing the type of services delivered from ADAP facility-based to supported employment. Approval of the conversion plan is the responsibility of the Regional Director of the Division and the Area Director or his designee if the facility is operated by a contract agency of the area program or other service provider. The Division shall request appropriate personnel from the Division of Vocational Rehabilitation to participate in the review process. The request for approval of the supported employment conversion plan shall include specific written information in the following areas:

(A) number of clients to be moved into supported employment placements;

(B) types of supported employment models to be used;

(C) timeframe for the conversion period;

(D) interim proposed facility staffing patterns and responsibilities; and

(E) proposed budget for conversion plan.

(9) "Area program" means a legally constituted public agency providing mental health, mental retardation and substance abuse services for a catchment area designated by the Commission. For purposes

of these Rules, the term "area program" means the same as "area authority" as defined in G.S. 122C-3.

(10) "Assessment" means a procedure for determining the nature and extent of the problem for which the individual is seeking service.

(11) "Atypical development" in children means those from birth to 60 months of age who demonstrate significantly atypical behavioral socioemotional, motor, or sensory development as manifested by:

(A) Diagnosed hyperactivity, attention deficit disorder or other behavioral disorders, or

(B) Identified emotional or behavioral disorders such as:

(i) delay or abnormality in achieving expected emotional milestones, such as pleasurable interest in adults and peers; ability to communicate emotional needs; and ability to tolerate frustrations.

(ii) persistent failure to initiate or respond to most social interactions.

(iii) fearfulness or other distress that does not respond to comforting by caregivers.

(iv) indiscriminate sociability, e.g. excessive familiarity with relative strangers.

(v) self-injurious or unusually aggressive behavior, or

(C) Substantiated physical abuse, sexual abuse, or other environmental situations that raise significant concern regarding the child's emotional well-being.

(12) "Certified counselor" means an alcoholism, drug abuse or substance abuse counselor who is certified by the North Carolina Substance Abuse Professional Certification Board.

(13) "Child" means a minor from birth through 12 years of age.

(14) "Chronically mentally ill adult" means an individual 18 years of age or older who, as a result of a mental disorder, exhibits emotional or behavioral functioning which is so impaired as to interfere substantially with his capacity to remain in the community without supportive treatment or services of a long-term or indefinite duration. In these persons, mental disability is severe and persistent, resulting in long-term limitation of their functional capacities for primary activities of daily living such as interpersonal relations, homemaking, self-care, employment and recreation.

(15) "Client record" means a written account of all services provided a client from the time of admission of the client by the facility until discharge from the facility.

(16) "Clinical" means having to do with the active direct treatment/habilitation of a client.

(17) "Clinical staff member" means a professional who provides active direct treatment/habilitation to a client.

(18) "Clinical/professional supervision" means regularly scheduled assistance by a qualified mental health professional, a qualified substance abuse professional or a qualified developmental disabilities professional to a staff member who is providing direct, therapeutic intervention to a client or clients. The purpose of clinical supervision is to ensure that each client receives appropriate treatment or habilitation which is consistent with accepted standards of practice and the needs of the client.

(19) "Contested case" means an administrative proceeding under G.S. 150B, Article 3, in which the rights, privileges, or duties of a party are required by law to be determined.

(20) "Contract agency" means a legally constituted entity with which the area program contracts for a service exclusive of intermittent purchase of service for an individually identified client.

(21) "Day/night service" means a service provided on a regular basis, in a structured environment that is offered to the same individual for a period of three or more hours within a 24-hour period.

(22) "Declaratory ruling" means a formal and binding interpretation as to:

- (A) the validity of a rule; or
- (B) the applicability to a given state of facts of a statute administered by the Department of Human Resources, or a rule or order of the Department of Human Resources.

(23) "Detoxification" means the physical withdrawal of an individual from alcohol or other drugs in order that the individual can participate in rehabilitation activities.

(24) "Developmentally delayed children" means those whose development is delayed in one or more of the following areas: cognitive development; physical development, including vision and hearing; language and speech; psychosocial and self-help skills. The specific level of delay must be:

- (A) for children from birth to 36 months of age, documented by scores 1½ standard deviations below the mean on standardized tests in at least one of the above areas of development. Or, it may be documented by a 20 percent delay on assessment instruments that yield scores in months; and
- (B) for children from 36 to 60 months of age, documented by test performance two standardized deviations below the mean on standardized tests in one area of development or by performance that is one standard deviation below the norm in two areas of development. Or, it may be documented by a 25 percent delay in two areas on assessment instruments that yield scores in months.

(25) "DFS" means the Division of Facility Services, 701 Barbour Drive, Raleigh, N.C. 27603.

(26) "Direct care staff" means an individual who provides active direct care, treatment, or rehabilitation or habilitation services to clients.

(27) "Dispensing medication" means preparing and packaging a prescription drug or device in a container and labeling the container with information required by state and federal law. Filling or refilling drug containers with prescription drugs for subsequent use by a client is "dispensing". Providing quantities of unit dose prescription drugs for subsequent administration is "dispensing".

(28) "DMH/DD/SAS" means the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services, 325 N. Salisbury Street, Raleigh, N.C. 27603.

(29) "Documentation" means provision of written, dated and authenticated evidence of the delivery of client services or compliance with statutes or rules, e.g., entries in the client record, policies and procedures, minutes of meetings, memoranda, reports, schedules, notices and announcements.

(30) "Drug abuse" means psychoactive substance abuse which is a residual category for noting maladaptive patterns of psychoactive substance use that have never met the criteria for dependence for that particular class of substance (criteria delineated in DSM-III-R published by the American Psychiatric Association, 1400 K Street, N.W., Washington, D.C. 20005 at a cost of twenty-nine dollars and

ninety-five cents (\$29.95) for the soft cover edition and thirty-nine dollars and ninety-five cents (\$39.95) for the hard cover edition.) This adoption by reference is in accordance with G.S. 150B-11(e). includes subsequent amendments and editions of the referenced material.

(31) "Drug dependence" means psychoactive substance dependence which is a cluster of cognitive behavioral, and physiologic symptoms that indicate that a person has impaired control of psychoactive substance use and continues use of the substance despite adverse consequences (criteria delineated in DSM-III-R published by the American Psychiatric Association, 1400 K Street, N.W., Washington, D.C. 20005 at a cost of twenty-nine dollars and ninety-five cents (\$29.95) for the soft cover edition and thirty-nine dollars and ninety-five cents (\$39.95) for the hard cover edition.) This adoption by reference is in accordance with G.S. 150B-11(e). includes subsequent amendments and editions of the referenced material.

(32) "DWI" means driving while impaired, as defined in G.S. 20-138.1.

(33) "DWI substance abuse assessment" means a service provided to persons charged with or convicted of DWI to determine the presence of chemical dependency. The "assessment" involves a face-to-face interview with a substance abuse professional.

(34) "Early Intervention Services" means those services provided for infants and toddlers specified in Section 303.12 of Subpart A of Part 303 of Title 34 of the Code of Federal Regulations. For the purposes of these services, however, transportation means assistance in the travel to and from specified early intervention services provided by certified developmental day centers or other center-based services designed specifically for children with or at risk for disabilities; and speech, physical or occupational therapy if provided in a specialized setting away from the child's residence. Transportation assistance may be provided by staff, existing public or private services or by the family, who shall be reimbursed for their expenses, in accordance with applicable fee provisions. This adoption by reference is in accordance with G.S. 150B-11(e). includes subsequent amend-
ments and editions of the referenced material.

(35) "Evaluation" means an assessment service which identifies the nature and extent of an individual's problem through a systematic appraisal for the purposes of diagnosis and determination of the disability of the individual and the most appropriate plan, if any, for services.

(36) "First aid" means emergency treatment for injury or sudden illness before regular medical care is available. First aid includes artificial respiration, the Heimlich maneuver, or other Red Cross first aid techniques for relieving airway obstruction, care of wounds and burns, and temporary administering of splints.

(37) "Governing body" means, in the case of a corporation, the board of directors; in the case of an area authority, the area board; and in all other cases, the owner of the facility.

(38) "Health Services" means those services provided for infants and toddlers specified in Section 303.13 of Subpart A of Part 303 of Title 34 of the Code of Federal Regulations. This adoption by reference is in accordance with G.S. 150B-11(e). includes subsequent amendments and editions of the referenced material.

(39) "Hearing" means, unless otherwise specified, a contested case hearing under G.S. 150B, Article 3.

(40) "High risk children" means those from birth to 36 months of age for whom there is clinical evidence of conditions which have a high probability of resulting in developmental delay or atypical development and for whom there is clinical evidence that developmental or therapeutic intervention may be necessary. There are two categories of high risk children. These are:

(A) High Risk-Established: Diagnosed or documented physical or mental conditions which are known to result in developmental delay or atypical development as the child matures. Such conditions are limited to the following:

(i) chromosomal anomaly or genetic disorders associated with developmental deficits;

(ii) metabolic disorders associated with developmental deficits;

(iii) infectious diseases associated with developmental deficits;

(iv) neurologic disorders;

(v) congenital malformations;

(vi) sensory disorders; or
(vii) toxic exposure.

(B) High Risk-Potential: Documented presence of indicators which are associated with patterns of development and which have a high probability of meeting the criteria for developmental delay or atypical development as the child matures. There shall be documentation of at least three of the parental or family, neonatal, or postneonatal risk conditions as defined in the publication, "NORTH CAROLINA CHILD SERVICE COORDINATION PROGRAM" available from the Division of Maternal and Child Health, Department of Environment, Health, and Natural Resources, P.O. Box 27687, Raleigh, NC 27611-7687. ~~adopted in accordance with G.S. 150B-14(e)~~ This adoption by reference includes subsequent amendments and editions of the referenced material. These conditions are as follows:

- (i) maternal age less than 15 years;
- (ii) maternal PKU;
- (iii) mother HIV positive;
- (iv) maternal use of anticonvulsant, antineoplastic or anticoagulant drugs;
- (v) parental blindness;
- (vi) parental substance abuse;
- (vii) parental mental retardation;
- (viii) parental mental illness;
- (ix) difficulty in bonding between parent and infant;
- (x) difficulty in providing basic parenting;
- (xi) lack of stable housing;
- (xii) lack of familial and social support;
- (xiii) family history of childhood deafness;
- (xiv) maternal hepatitis B;
- (xv) birth weight less than 1500 grams;
- (xvi) gestational age less than 32 weeks;
- (xvii) respiratory distress (mechanical ventilator greater than six hours);
- (xviii) asphyxia;
- (xix) hypoglycemia (less than 25 mg/dl);
- (xx) hyperbilirubinemia (greater than 20 mg/dl);
- (xxi) intracranial hemorrhage;
- (xxii) neonatal seizures;
- (xxiii) major congenital anomalies;
- (xxiv) CNS infection or trauma;
- (xxv) congenitally acquired infection;
- (xxvi) suspected visual impairment;
- (xxvii) suspected hearing impairment;
- (xxviii) no well child care by age six months;

(xxix) failure on standard developmental or sensory screening test;

(xxx) significant parental concern; and

(xxxi) suspected abuse or neglect. who:

- (41) "Hours of operation" means an indication of the minimum operational hours that a service is expected to be available to clients, but not prohibiting the typical closing of a service to accommodate holidays, vacations, staff development activities and weather and facility-related conditions but taking into consideration the type of service being provided.
- (42) "ICF/MR" (Intermediate Care Facility/Mentally Retarded) means a facility certified as having met federal ICF/MR requirements and which provides 24-hour personal care, habilitation, developmental and supportive services to persons with mental retardation or related conditions.
- (43) "Incident" means any happening which is not consistent with the routine operation of the facility or the routine care of a client and that is likely to lead to adverse effects upon a client.
- (44) "Infant" means an individual from birth through two years of age.
- (45) "Legend drug" means a drug that cannot be dispensed without a prescription.
- (46) "License" means a permit to operate a facility which is issued by DFS under G.S. 122C, Article 2.
- (47) "Medication" means a substance recognized in the official "United States Pharmacopoeia" or "National Formulary" intended for use in the diagnosis, mitigation, treatment or prevention of disease.
- (48) "Minor client" means a person under 18 years of age who has not been married or who has not been emancipated by a decree issued by a court of competent jurisdiction or is not a member of the armed forces.
- (49) "Neighborhood" - See "residential setting".
- (50) "Nurse" means a person licensed to practice in the State of North Carolina either as a registered nurse or as a licensed practical nurse.
- (51) "Operator" means the designated agent of the governing body who is responsible for the management of a licensable facility.
- (52) "Outpatient" or "Outpatient service" means the same as *periodic service*.

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- (53) "Parent" means the legally responsible person unless otherwise clear from the context.
- (54) "Periodic service" means a service provided through short, recurring visits for persons who are mentally ill, developmentally disabled or substance abusers.
- (55) "Physical examination" means the procedures used by a physician or physician extender on behalf of a physician to determine the physiological and anatomical condition of the client. Physical examination also means medical examination.
- (56) "Physician extender" means a nurse practitioner or a physician assistant approved to perform medical acts by the Board of Medical Examiners of the State of North Carolina.
- (57) "Preschool age child" means a child from three through five years of age.
- (58) "Private facility" means a facility not operated by or under contract with an area program.
- (59) "Program evaluation" means the systematic documented assessment of program activity to determine the effectiveness, efficiency and scope of the system under investigation, to define its strengths and weaknesses and thereby to provide a basis for informed decision-making.
- (60) "Provider" means an individual, agency or organization that provides mental health, mental retardation or substance abuse services.
- (61) "Psychiatric nurse" means an individual who is licensed to practice as a registered nurse in the State of North Carolina by the North Carolina Board of Nursing and who is a graduate of an accredited master's level program in psychiatric mental health nursing with two years of experience, or has a master's degree in behavioral science with two years of supervised clinical experience, or has four years of experience in psychiatric mental health nursing.
- (62) "Psychiatric social worker" means an individual who holds a master's degree in social work from an accredited school of social work and has two years of clinical social work experience.
- (63) "Psychiatrist" means an individual who is licensed to practice medicine in the State of North Carolina and who has completed an accredited training program in psychiatry.
- (64) "Psychotherapy" means a form of treatment of mental illness or emotional disorders which is based primarily upon verbal or non-verbal communication with the patient. Treatment is provided by a trained professional for the purpose of removing or modifying existing symptoms, of attenuating or reversing disturbed patterns of behavior, and of promoting positive personality growth and development.
- (65) "Psychotropic medication" means medication with the primary function of treating mental illness or personality or behavior disorders. These medications include, but are not limited to, antipsychotics, antidepressants, neuroleptics, lithium and minor tranquilizers.
- (66) "Qualified alcoholism professional" means an individual who is certified by the North Carolina Substance Abuse Professional Certification Board or who is a graduate of a college or university with a baccalaureate or advanced degree in a human service related field with documentation of at least two years of supervised experience in the profession of alcoholism counseling.
- (67) "Qualified developmental disabilities professional" means an individual holding at least a baccalaureate degree in a discipline related to developmental disabilities, and at least two years of supervised habilitative experience in working with the mentally retarded or otherwise developmentally disabled or holding a baccalaureate degree in a field other than one related to developmental disabilities and having three years of supervised experience in working with the mentally retarded or otherwise developmentally disabled.
- (68) "Qualified drug abuse professional" means an individual who is certified by the North Carolina Substance Abuse Professional Certification Board or who is a graduate of a college or university with a baccalaureate or advanced degree in a human service related field with documentation of at least two years of supervised experience in the profession of drug abuse counseling.
- (69) "Qualified mental health professional" means any one of the following: psychiatrist, psychiatric nurse, practicing psychologist, psychiatric social worker, an individual with at least a master's degree in a related human service field and two years of supervised clinical experience in

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mental health services or an individual with a baccalaureate degree in a related human service field and four years of supervised clinical experience in mental health services.

(70) "Qualified nutritionist" means an individual who has a Master's degree in nutrition, nutrition education or public health nutrition and who may or may not be a registered dietitian.

(71) "Qualified substance abuse professional" means an individual who is:

- (A) certified by the North Carolina Substance Abuse Professional Certification Board; or
- (B) a graduate of a college or university with a baccalaureate or advanced degree in a human service related field with documentation of at least two years of supervised experience in the profession of alcoholism and drug abuse counseling.

(72) "Registered dietitian" means an individual who has successfully completed a national examination for the Commission on Dietetic Registration and maintains registration with that commission through approved continuing education activities and events.

(73) "Rehabilitation" means training, care and specialized therapies undertaken to assist a client to reacquire or maximize any or all lost skills or functional abilities.

(74) "Research" means inquiry involving a trial or special observation made under conditions determined by the investigator to confirm or disprove a hypothesis, or to explicate some principle or effect. The term "research" as used in this document means research which is not standard or conventional; involves a trial or special observation which would place the subject at risk for injury (physical, psychological or social injury), or increase the chance of disclosure of treatment; utilizes elements or steps not ordinarily employed by qualified professionals treating similar disorders of this population; or is a type of procedure that serves the purpose of the research only and does not include treatment designed primarily to benefit the individual.

(75) "Residential setting" means a living area or zone in which the primary purpose is family residential living and which may be located in an area zoned either urban residential or rural.

(76) "Respite discharge" means that point in time when no additional incidents of respite services are anticipated.

(77) "Respite episode" means an uninterrupted period of time during which a client receives respite services.

(78) "Screening" means an assessment service which provides for a brief appraisal of each individual who presents himself for services, in order to determine the nature of the individual's problem and his need for services. Screening may also include referral to other appropriate community resources.

(79) "Secretary" means the Secretary of the Department as defined in G.S. 122C-3.

(80) "Service" means an activity or interaction intended to benefit another, with, or in behalf of, an individual who is in need of assistance, care, habilitation, intervention, rehabilitation or treatment.

(81) "Severely physically disabled person" means for the purpose of ADAP (Adult Developmental Activity Program) a person:

- (A) who has a severe physical disability which seriously limits his functional capabilities (mobility, communication, self-care, self-direction, work tolerance or work skills);
- (B) who has one or more physical disabilities resulting from amputation, arthritis, blindness, cancer, cerebral palsy, cystic fibrosis, deafness, heart disease, hemiplegia, hemophilia, respiratory or pulmonary dysfunction, multiple sclerosis, muscular dystrophy, musculoskeletal disorders, neurological disorders (including stroke and epilepsy), paraplegia, quadriplegia, and other spinal cord conditions, sickle cell anemia and end stage renal disease; and
- (C) whose habilitation or rehabilitation can be expected to require multiple habilitation or rehabilitation services over an extended period of time.

(82) "Sheltered employment" means a facility's provision of work and work training by:

- (A) subcontracting from industries in the community and bringing work to the facility to be performed; or
- (B) manufacturing its own products in the facility. Clients served in a sheltered employment model are those who consistently achieve earning levels exceeding one-half of the minimum wage but who

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are not ready for independent employment activities.

(83) "Staff member" means any individual who is employed by the facility.

(84) "Substantially mentally retarded person" means for the purpose of ADAP a person who is mentally retarded to the degree of seriously limiting his functional capabilities, whose habilitation or rehabilitation can be expected to extend over a period of time, and including:

- (A) moderately mentally retarded persons;
- (B) severely mentally retarded persons;
- (C) profoundly mentally retarded persons; or
- (D) mentally retarded persons with a handicapping condition so severe as to lack the potential for employment at this time, either in a sheltered or competitive setting. In addition, such individuals must have a deficit in self-help, communication, socialization or occupational skills and be recommended by the vocational rehabilitation counselor for consideration of placement in an ADAP.

(85) "Support services" means services provided to enhance an individual's progress in his primary treatment/habilitation program.

(86) "Supported employment" means a day/night service which involves paid work in a job which would otherwise be done by a non-disabled worker. Supported employment is carried out in an integrated work site where a small number of people with disabilities work together and where the work site is not immediately adjacent to another program serving persons with disabilities. It includes intensive involvement of staff working with the individuals in these integrated settings.

(87) "Toddler" means an individual from one through three years of age.

(88) "Treatment" means the process of providing for the physical, emotional, psychological and social needs of clients through services.

(89) "Treatment habilitation plan" means a plan in which one or more professionals, privileged in accordance with 10 NCAC 14K .0319, working with the client and, in some cases, family members or other service providers, document which interventions will be provided and the goals, objectives and strategies that will be followed in providing services to the client.

(90) "Twenty-four hour facility in which medical care is an integral component" means a facility in which:

- (A) the medication needs of clients may be evaluated, medication prescribed and laboratory tests ordered to assist in the diagnosis, treatment and monitoring of problems associated with the mental health, mental retardation or other developmental disabilities or substance abuse disorder of clients; and
- (B) proper referral of the client is made to medical specialists when needed.

(91) "Twenty-four hour service" means a service which is provided to a client on a 24-hour continuous basis.

Statutory Authority G.S. 122C-3; 122C-26; 143B-147.

SECTION .0200 - LICENSURE

.0210 LICENSE RENEWAL

- (a) Renewal of regular licenses shall be as specified in G.S. 122C-23(e).
- (b) Prior to license renewal, the licensee shall submit to DFS the following information:
 - (1) application for license renewal;
 - (2) local fire and ~~sanitation inspection~~ reports which shall be submitted on an annual basis; and
 - (3) local ~~sanitation inspection reports on an annual basis for facilities which provide room or board;~~ and
 - (4) ~~(3)~~ a brief description of any changes in the facility since the most recent initial or renewal application form was completed.
- (c) Failure of the licensee to supply the required information may result in revocation of the license to operate the facility.
- (d) DFS shall obtain any other information necessary for proper administration and enforcement of all applicable licensure requirements.

Statutory Authority G.S. 122C-23(e); 130A-235; 143B-147.

SECTION .0300 - FACILITY AND PROGRAM MANAGEMENT

.0315 TREATMENT/HABILITATION PLANNING AND DOCUMENTATION

- (a) The governing body shall develop and implement written policies regarding individual treatment/habilitation plans and the qualifications of staff, based on education and experience, who will be responsible for implementation of such plans.

(b) A treatment/habilitation plan shall be based upon an assessment of the client's condition, assets and needs, and the resources to meet these needs, and shall be developed in partnership with the client.

(c) The parent or the legally responsible person of a minor shall have the opportunity to participate in the development and implementation of the minor client's individual treatment/ habilitation plan.

(d) The parent, with client consent, or the legally responsible person of an adult shall have the opportunity to participate in the development and implementation of the adult client's individual treatment/habilitation plan.

(e) Clinical responsibility for the development and implementation of the treatment/habilitation plan shall be designated.

(f) Initial treatment/habilitation objectives shall be documented, if services are to be provided, prior to the establishment and implementation of the comprehensive treatment/habilitation plan.

(g) Except as provided in Paragraphs (h) through (j) of this Rule, a comprehensive plan shall be developed and initiated within 30 days of admission for clients who are expected to receive services from the facility beyond 30 days. The plan shall include, as appropriate to the client's needs:

- (1) documentation of the established diagnosis;
- (2) time-specific, measurable goals for treatment/habilitation;
- (3) general strategies or procedures to be undertaken in order to meet goals and the direct care staff responsible for implementation;
- (4) time-specific, measurable education or treatment goals for family or significant others, if applicable; and
- (5) a schedule for time-specific planned reviews, which may be set, in addition to those required in Paragraph (k) of this Rule.

(h) For all facilities serving infants and toddlers with or at risk for developmental disabilities, delays or atypical development, except for respite:

- (1) there shall be a habilitation plan which is referred to as the Individualized Family Service Plan (IFSP) which shall include:

(A) a description of the child's present health status and levels of physical (including vision and hearing), language and speech, cognitive, psychosocial, and self-help skills development;

(B) with the concurrence of the family, a description of the family's strengths and

needs related to enhancing the development of the child;

(C) goals for the child, and, if requested, goals for the child's family;

(D) criteria and time frames to be used to determine progress towards goals;

(E) planned habilitation procedures related to the goals;

(F) a statement of the specific early intervention services to be provided to meet the identified child and family needs, the initiation dates, frequency and method, duration, intensity and location of service delivery, and the persons or agencies responsible;

(G) the designation of the staff member responsible for service coordination;

(H) the plans for transition into services which are the responsibility of the N.C. Department of Public Instruction, when applicable;

(I) the payment arrangements for the specific services delineated in Subparagraph (h)(1)(F) of this Rule;

(J) a description of medical and other services needed by the child, but which are not required under P.L. 99-457, and the strategies to be pursued to secure those services through public or private resources.

(2) The IFSP shall be:

(A) reviewed on at least a semi-annual basis or more frequently upon the family's request; and

(B) revised as appropriate, but at least annually.

(3) The initial development and annual review process for the IFSP for infants and toddlers shall include participation by:

(A) the parent or parents of the child;

(B) other family members, as requested by the parent;

(C) an advocate or person outside of the family if the parent requests that the person participate;

(D) the provider of the early intervention services;

(E) the service coordinator designated for the family, if different from the provider of the early intervention services; and

(F) the provider of the assessment service, if different from the provider of the early intervention services.

The semi-annual review process shall include participation by persons identified in Subparagraphs (h)(3)(A) through (E) of this Rule. If any of these individuals are unable to attend one of the development or review meetings, arrange-

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ments shall be made for the person's involvement through other means such as participation in a telephone conference call, having a knowledgeable authorized representative attend the meeting or making pertinent records available at the meeting.

- (4) The IFSP for infants and toddlers is based upon the results of the assessment referenced in 10 NCAC 14K .0314(e). However, early intervention services may commence before completion of this assessment if parental consent is obtained, the assessment is completed within the time period referenced in 10 NCAC 14K .0314(e), and an interim IFSP is developed. The interim IFSP shall include:
 - (A) the name of the service coordinator who will be responsible for the implementation of the IFSP and coordination with other agencies and individuals;
 - (B) goals for the child and family when recommended;
 - (C) those early intervention services that are needed immediately; and
 - (D) suggested activities that may be carried out by the family members.
- (5) Each facility or individual who has a direct role in the provision of early intervention services specified in the IFSP is responsible for making a good faith effort to assist each eligible child in achieving the goals set forth in the IFSP.
- (6) The IFSP shall be developed within 45 days of referral for those children determined to be eligible. The referral shall be as defined in 10 NCAC 14K .0314(e)(11).
 - (i) The goals for a client who receives services from facilities providing day activity or alternative family living, half-way house, therapeutic camp or group home services in which the supervision and therapeutic intervention are limited to sleeping time, home living skills and leisure time activities, may be limited to life-skill, social or recreational goals.
 - (j) The goals for a client who receives services from a community respite facility may be limited to the special needs of the client, including medications to be administered, dietary considerations and expectations regarding other services.
 - (k) A full review of each client's treatment/habilitation plan shall be conducted at least annually by the responsible professional in accordance with the facility's quality assurance plan, as determined by 10 NCAC 14K .0319. The review shall include:
 - (1) the client's continuing need for service; and

- (2) a continuation or update of the client's treatment/habilitation plan as defined in Paragraph (g) of this Rule.

Statutory Authority G.S. 122C-26; 143B-147.

SUBCHAPTER 14M - LICENSURE RULES FOR MENTAL RETARDATION/DEVELOPMENTAL DISABILITIES FACILITIES

SECTION .0400 - GROUP HOMES FOR CHILDREN WITH MENTAL RETARDATION OR OTHER DEVELOPMENTAL DISABILITIES

.0410 PARTICIPATION OF THE FAMILY OR LEGALLY RESPONSIBLE PERSON

- (a) Staff shall help the family in understanding mental retardation and other developmental disabilities, the child's development, and the extent of the child's handicap.
- (b) Family members shall be provided the opportunity to participate in training seminars.
- (c) Each family shall be encouraged to maintain an ongoing relationship with their child through such means as family visits to the facility, and the child's visits with the parent or the legally responsible person outside the facility.
- (d) Reports to the parent or the legally responsible person shall be submitted ~~in writing~~ at least annually. ~~with the opportunity extended to the parent or the legally responsible person for participation in at least one conference annually. Reports may be in writing or take the form of a conference and shall focus on the child's progress toward meeting individual goals.~~

Statutory Authority G.S. 122C-26; 143B-147.

Notice is hereby given in accordance with G.S. 150B-21.2 that the Division of Aging intends to adopt rule(s) cited as 10 NCAC 22Q .0101 - .0103, .0201 - .0202.

The proposed effective date of this action is July 1, 1992.

The public hearing will be conducted at 2:00 p.m. on April 30, 1992 at the Division of Aging, 693 Palmer Dr., Room 127, Raleigh, N.C.

Reasons for Proposed Actions:

10 NCAC 22Q .0101 - Establishes the scope of the Housing and Home Improvement service.

10 NCAC 22Q .0102 - Provides definitions for Housing and Home Improvement service.

10 NCAC 22Q .0103 - Identifies target population for the Housing and Home Improvement service.

10 NCAC 22Q .0201 - Specifies client eligibility criteria for the Housing and Home Improvement service.

10 NCAC 22Q .0202 - Provides service characteristics for the Housing and Home Improvement service.

Comment Procedures: Written comments will be received by the Director of the Division of Aging through May 15, 1992. Verbal comments will be heard at the public hearing.

CHAPTER 22 - AGING

SUBCHAPTER 22Q - HOUSING AND HOME IMPROVEMENT SERVICE

SECTION .0100 - SCOPE OF SERVICE

.0101 SCOPE OF HOUSING AND HOME IMPROVEMENT SERVICE

Housing and Home Improvement Service means assistance to older adults in obtaining or retaining adequate housing and basic furnishings or appliances, or both. The service has three distinct elements:

- (1) Provision of counseling, advocacy and training to individuals or to groups;
- (2) Provision of labor and materials for minor renovations and repairs to dwellings to remedy conditions which are a risk to the personal health and safety of older adults or to enhance mobility for functionally impaired individuals;
- (3) Provision of basic furnishings or appliances, or both, to remedy deficiencies which pose a risk to the basic health and safety of the older adult.

Statutory Authority G.S. 143B-181.1(a)(11); 143B-181.1(c).

.0102 DEFINITIONS

(a) "Adequate housing" means a dwelling that is lawfully and reasonably sufficient to meet the needs of the individual and his family.

(b) "Advocacy" means efforts on behalf of older adults who require assistance with accessing or obtaining community services and supports.

(c) "Basic appliances" means items necessary for refrigerating or preparing food, or heating or cooling the home.

(d) "Basic furnishings" means essential household items.

(e) "Minor renovations and repairs" means restoration of the dwelling so as to lessen risks to personal health and safety without including any structural change to the dwelling.

(f) "Obtaining" under this service means location of and negotiating for adequate housing or basic furnishings and arranging for relocation to other housing or for the movement of basic furnishings.

(g) "Older adult" means an individual 60 years of age or older.

(h) "Own home" means that the individual is living in a residence he maintains for himself or is maintained for him by his caretaker. "Own home" does not include any group care.

(i) "Retaining" under this service means negotiating with individuals who have influence over or control of the individual's ability to continue keeping his abode or his basic furnishings.

Statutory Authority G.S. 143B-181.1(a)(11); 143B-181.1(c).

.0103 TARGET POPULATION

Older adults needing one or more elements of the service, such as counseling, advocacy, training, renovations or repairs to dwellings, basic furnishings or appliances, to obtain or retain adequate housing that enables them to remain in, or return to, their own homes and alleviates risk to their personal health and safety.

Statutory Authority G.S. 143B-181.1(a)(11); 143B-181.1(c).

SECTION .0200 - SERVICE PROVISION

.0201 CLIENT ELIGIBILITY FOR HOUSING AND HOME IMPROVEMENT SERVICE

(a) Persons 60 years of age and older who meet the criteria for the target population are determined to be in need of the service and are eligible.

(b) Persons acting on behalf of an eligible older adult are allowed to be a direct recipient of counseling, advocacy and training.

Statutory Authority G.S. 143B-181.1(a)(11); 143B-181.1(c).

.0202 SERVICE DELIVERY

(a) Renovations and repairs to renter occupied dwellings may be provided only when this is not the responsibility of the landlord.

(b) Basic furnishings or appliances, or both, may be provided to residents of renter occupied

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dwellings only when such items are not the responsibility of the landlord.

(c) Reimbursement is available for the cost of salary, fringe benefits and other administrative costs associated with the provision of Housing and Home Improvement Services.

(d) Reimbursement is available for the costs of labor or material, or both, needed for renovations and repairs to the homes of eligible individuals under the following circumstances:

- (1) the renovations or repairs are minor and do not include any structural change; reimbursements are limited to a maximum of eight hundred dollars (\$800.00) for labor or materials, or both, per area of repair; e.g., roof, bathroom, and
- (2) the costs are reasonable and necessary, and
- (3) the condition of the home is such that minor renovations or repairs will make the dwelling safe and healthy for the occupants.

(e) Reimbursement is available for the purchase of new or used basic furnishings or appliances as long as they are in such condition that they meet the needs of the individual.

Statutory Authority G.S. 143B-181.1(a)(11); 143B-181.1(c).

* * * * *

Notice is hereby given in accordance with G.S. 150B-21.2 that the Department of Human Resources intends to adopt rules cited as 10 NCAC 46D .0301 - .0306.

The proposed effective date of this action is July 1, 1992.

The public hearing will be conducted at 1:00 - 3:00 p.m. May 15, 1992 at the Council Building, Room 201, 701 Barbour Drive, Raleigh, NC.

Reason for Proposed Action: Rulemaking Petition by the Child Day Care Commission.

Comment Procedures: Written or oral comments may be submitted at the Public Hearing. Written comments may also be submitted prior to the Public Hearing. Comments or Questions should be directed to Mr. Jackie Sheppard, APA Coordinator, Division of Facility Services, P.O. Box 29530, Raleigh, NC 27626-0530, Telephone (919) 733-2342.

CHAPTER 46 - DAY CARE RULES

SUBCHAPTER 46D - STATE DAY CARE SERVICES FUND

SECTION .0300 - REQUIREMENTS FOR CONTRACTS WITH PRIVATE AGENCIES

.0301 SCOPE

The rules of this Section shall apply to all private agencies administering the state subsidized day care program within any geographical area of North Carolina under contractual arrangement with the Department of Human Resources or a local department of social services.

Statutory Authority G.S. 143B-153(2a).

.0302 APPROVAL

(a) All contracts with private agencies administering the state subsidized day care program shall be approved by the Department prior to their execution.

(b) Each private agency administering the subsidized day care program shall provide to the Department, prior to execution of a contract to administer the program, a complete and detailed copy of its budget, including both income and expenditures. The private agency shall demonstrate to the satisfaction of the Department sufficient dependable sources of income to insure its continued operation during the contract period.

Statutory Authority G.S. 143B-153(2a).

.0303 LENGTH OF CONTRACT

Contracts with private agencies to administer the state day care program shall be for a term not to exceed one year and shall expire on or before the end of the state fiscal year.

Statutory Authority G.S. 143B-153(2).

.0304 ADMINISTRATION OF FUNDS

(a) State and federal funds for child day care services shall be disbursed only as reimbursement to the private agency for funds previously paid by the agency to day care providers for day care services.

(b) The private agency shall reimburse providers for authorized services within no more than 10 working days after the end of the calendar month in which services were provided.

Statutory Authority G.S. 143B-153(2a).

.0305 ADMINISTRATION OF PROGRAM

(a) Each private agency administering the subsidized day care program shall exercise any powers and duties delegated to it under this Chapter

or under contract in a fair and impartial manner. It shall not discriminate with respect to any day care parent or day care provider in reaction to any complaint lodged with or against the agency by that parent or day care provider or in reaction to any opposition or support expressed by that parent or day care provider to a position taken by the agency on any day care issue. It shall comply fully with the parental freedom of choice provisions of 10 NCAC 46H .0109.

(b) A private agency determined by the Secretary or his designee to have violated the provisions of this Rule shall be ineligible to contract for administration of the subsidized day care program funds for a period determined by the Secretary of up to three years from the date of the Secretary's determination that a violation has occurred. Determinations by the Secretary may be appealed by the agency or by the complainant pursuant to G.S. 150B-23.

Statutory Authority G.S. 143B-153(2a).

.0306 RECORDS

(a) If the private agency is organized as a corporation or unincorporated association, it shall upon request of the Department or other contractor, open its minute books of meetings of directors, shareholders, or members for inspection.

(b) Each private agency administering state day care funds shall maintain records of all receipts and disbursements for a period of three years following final payment for the contract period, or until all audits begun within the three-year period are complete.

(c) If a private agency ceases operation, it shall provide the Department with copies of the records specified in this Rule.

(d) Each private agency administering state or federal day care services funds shall have a written policy for the inspection, examination, and copying of public records maintained by the agency. The written policy shall comply with the provisions of Chapter 132 of the General Statutes.

Statutory Authority G.S. 143B-153(2a).

TITLE 11 - DEPARTMENT OF INSURANCE

Notice is hereby given in accordance with G.S. 150B-21.2 that the N.C. Department of Insurance intends to amend rules cited as 11 NCAC 3 .0002, .0006, .0008; repeal rules cited as 11 NCAC 3 .0005, .0007.

*T*he proposed effective date of this action is July 1, 1992.

*T*he public hearing will be conducted at 10:00 a.m. on April 30, 1992 at the Dobbs Building, 3rd Floor Hearing Room, 430 North Salisbury Street, Raleigh, NC 27611.

*R*eason for Proposed Action: To reflect changes in the Department's structure and to make corresponding amendments and repeals to conform with contested case hearing rules.

*C*omment Procedures: Written comments may be sent to Bill Hale, Hearings Division, P.O. Box 26387, Raleigh, NC 27611. Oral presentations may be made at the public hearing. Anyone having questions should call Bill Hale or Ellen Sprenkel at (919) 733-4529.

CHAPTER 3 - HEARINGS DIVISION

.0002 PURPOSE OF DIVISION

The Legal Division counsels, advises and renders legal assistance to the Commissioner and his staff in all matters necessary for the general administration of the insurance laws of this state and other matters over which the Commissioner has supervisory and regulatory jurisdiction. The Hearings Division has general supervisory authority over rule-making, proposed legislation, appeals to the Commissioner that are provided for and authorized by statute, departmental bulletins and legal directives, hearings provided for in Chapter 58 of the General Statutes, service of legal process upon the Commissioner as provided for in Chapter 58 of the General Statutes, and contested cases and hearings under Chapters 58 and 150B of the General Statutes and under Chapter 1 of this Title. The Commissioner shall appoint a Deputy Commissioner to oversee the operations of the Hearings Division.

Statutory Authority G.S. 58-2-1; 58-2-5; 58-2-25; 58-2-40(1); 58-2-50; 58-16-30; 58-16-35; 58-39-85; 58-21-100; 58-22-20(1); 58-22-40(b); 58-33-30(h)(2); 150B-21.

.0005 SERVICE OF LEGAL PROCESS

North Carolina General Statute Section 58-153, 58-153.1, 58-397, 58-410, 58-508(1), 58-512(b), and 58-615(h)(2) provide that service of legal process may be made upon insurance companies, insurance support organizations, risk retention and purchasing groups, and non-resident licensees doing business in this state by serving such process upon the Commissioner or a deputy

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duly appointed for such purpose. The Commissioner will appoint a deputy or deputies within the department to receive and perfect all legal process in accordance with the provisions of the applicable statutes.

Statutory Authority G.S. 58-153; 58-153.1; 58-397; 58-440; 58-508(1); 58-512(b); 58-615(h)(2).

.0006 RECORDS: ELECTRONIC PROCESS PROHIBITED

(a) Hearing records, transcripts and orders of the Commissioner as well as copies of documents in civil actions in which the Commissioner is a party are on file in the Legal Hearings Division and may be inspected in accordance with 11 NCAC 4 .0107. Chapters 58 and 132 of the General Statutes and applicable rules in this Title.

(b) Service of legal process upon the Commissioner as attorney to receive process under G.S. 1A-1, Rule 4 or under G.S. Chapter 58 is not valid and will not be accepted if it is made through any electronic medium, including facsimile transmission. Only those methods of service of process upon the Commissioner provided for in G.S. 1A-1, Rule 4 and in G.S. Chapter 58 will be recognized by the Commissioner or his duly appointed deputy.

Statutory Authority G.S. 58-2-40(1); 58-2-100; 58-16-30; 58-16-35.

.0007 PURCHASE OF HEARING TRANSCRIPTS

A copy of the hearing transcript may be purchased provided a request therefor is made in writing with the hearing officer prior to or at the commencement of the hearing.

Statutory Authority G.S. 58-9.3.

.0008 LEGAL OPINIONS

(a) When a person who is regulated by the Department requests clarification of a statute or rule where the person is engaging or is about to engage in a business activity that may violate the statute or rule, the Department may honor the request, subject to available resources or in the discretion of the Deputy Commissioner of the Legal Hearings Division.

(b) A request for a legal opinion made by a person who is involved in a legal or factual dispute proceeding, including litigation, arbitration, or mediation, or by a person who is involved in a factual dispute with any person regulated by the Department shall not be honored. A request for

a legal opinion on a hypothetical fact situation shall not be honored.

(c) A request for a legal opinion on a hypothetical fact situation shall not be honored. Any legal opinion rendered under this Rule shall be rendered only by an attorney duly licensed by the State of North Carolina.

(d) Every request for a legal opinion as to how to apply a statute or rule to a fact situation under this Rule must be made in writing. Such written request must be addressed to: Commissioner of Insurance, ATTENTION: Deputy Commissioner, Hearings Division, N.C. Department of Insurance, P.O. Box 26387, Raleigh, N.C. 27611. The person making the request should may be advised that it may not be appropriate for the Department to render a legal opinion and shall be advised that any legal opinion rendered by the Commissioner or his counsel, other than a declaratory ruling issued under G.S. 150B-17, is not binding on the Commissioner, and does not prevent the Commissioner from subsequently acting in a manner inconsistent with the legal opinion's conclusion.

(e) This rule does not affect or apply to opinions rendered to the Commissioner or his employees by the Attorney General or his employees. This rule does not apply to declaratory rulings made under G.S. 150B-4 and 11 NCAC 1 .0300.

Statutory Authority G.S. 58-2-25; 58-2-40(1).

* * * * *

Notice is hereby given in accordance with G.S. 150B-21.2 that the N.C. Department of Insurance intends to adopt rules cited as 11 NCAC 4 .0120 - .0122, .0429 - .0431; amend rules cited as 11 NCAC 4 .0319, .0415, .0417 - .0421, .0423 - .0424 and repeal rules cited as 11 NCAC 4 .0425 - .0428.

The proposed effective date of this action is July 1, 1992.

The public hearing will be conducted at 10:00 a.m. on April 30, 1992 at the Dobbs Building, 3rd Floor Hearing Room, 430 North Salisbury Street, Raleigh, NC 27611.

Reason for Proposed Action:

11 NCAC 4 .0120 - .0122, .0429 - .0431 - To keep current with insurance industry practices and to

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afford consumers better protection in dealing with agents and insurers.

11 NCAC 4 .0319, .0415, .0417 - .0421, .0423 - .0424

- To keep current with insurance industry practices and to afford consumers better protection in dealing with agents and insurers; and to clarify that rules regarding claims practices apply to first and third-party claims and to consolidate and update rule on after market parts.

11 NCAC 4 .0425 - .0428 - *To consolidate and update the provisions of the rules on after market parts.*

Comment Procedures: Written comments may be sent to Bill Stevens, Consumer Division, P.O. Box 26387, Raleigh, NC 27611. Oral presentations may be made at the public hearing. Anyone having questions should call Bill Stevens at (919) 733-2004 or Ellen Sprenkel at (919) 733-4529.

CHAPTER 4 - CONSUMER SERVICES DIVISION

SECTION .0100 - GENERAL PROVISIONS

.0120 POLICY OR SERVICE FEES

An agent, broker, or limited representative who intends to charge a policy or service fee in accordance with G.S. 58-33-85(b) shall not do so unless he complies with the following:

- (1) A sign that informs consumers in large bold print that a policy or service fee of (amount) will be charged, shall be displayed in a prominent place so as to be seen and read from any part of the office lobby.
- (2) The consumer's consent in writing is obtained with the date and amount shown each time a policy or service fee is charged.
- (3) A receipt for the payment of a policy or service fee shall be issued separately from the receipt issued for the policy premium.

Statutory Authority G.S. 58-2-40; 58-33-85(b).

.0121 PREMIUM PAYMENT RECEIPTS

Premium payment receipts shall contain the name and address of the agency or agent, broker, or limited representative, or the insurer.

Statutory Authority G.S. 58-2-40; 58-2-185; 58-2-195.

.0122 POWER-OF-ATTORNEY PROHIBITED

No agent, broker, or limited representative shall obtain a power-of-attorney from a consumer that authorizes the agent, broker, or limited representative to sign insurance-related forms.

Statutory Authority G.S. 58-2-40.

SECTION .0300 - LIFE: ACCIDENT AND HEALTH

.0319 CLAIMS PRACTICES: LIFE: ACCIDENT AND HEALTH INSURANCE

The commissioner shall consider as *prima facie* violative of G.S. 58-54.4(11) 58-63-15(11) the failure by an insurer to adhere to the following procedures concerning settlement of life, accident, health and disability claims when such failure is so frequent as to indicate a general business practice:

- (1) **Examining Physician's Opinion.** When the patient's health is in question, an insurer should give greater weight to the opinion of a physician who has examined the patient than to the opinion of a physician who has not examined the patient and whose opinion is based solely on a review of the examining physician's notes or reports. As used in this Section, "examination of the patient" shall include the interpretation by a specialist of the results of diagnostic tests performed on the patient by others.
- (2) **Settlement Offers.** Initial offers of settlement or compromise made by an insurer or its representative shall remain open for a reasonable period of time.
- (3) **Multiple Health Impairments.** When an insured is confined to the hospital with multiple health impairments some of which may be excluded from coverage, the insurer or its representative shall make pro rata payments where treatment for excluded conditions can be separated.
- (4) **Assignment of Benefits.** If an accident, health or disability contract does not prohibit assignment of benefits and a proper assignment (including notice to the insurer prior to the payment of the claim) is made, the insurer shall honor the assignment even though it may have erroneously paid the insured. Submission of a completed claims form G33H and its successor(s) indicating that an assignment is on file shall be treated as though it were submission of the actual assignment.
- (5) **Claim Status Reports.** If benefits claimed under an accident, health or disability contract have not been paid within 45 30 days after receipt of the initial claim by the insurer, the insurer shall at that time mail a claim status report to the insured. The Claim Status Report shall include the following information:

- (A) The date upon which the insurer received the initial claim;
- (B) The insurer's claim or other identifying number;
- (C) The name of insurer's representative handling the claim, the representative's telephone number, and the hours and days the representative may be contacted by telephone; and
- (D) The identification of specific initial claim documentation disputed by the insurer. All initial claim documentation not disputed shall be paid within the 30-day time period specified in this Rule.

Statutory Authority G.S. 58-2-40; 58-63-15; 58-65-1; 58-65-40; 58-67-65; 58-67-150.

SECTION .0400 - PROPERTY AND LIABILITY

.0415 SAFE DRIVER INCENTIVE PLAN

The following are Department of Insurance policies regarding the Safe Driver ~~Insurance~~ Incentive Plan ("SDIP"):

- (1) License revocation for refusal to submit to chemical tests shall not be considered conviction of a moving traffic violation.
- (2) A conviction for driving the wrong way on a one-way street is not a conviction for driving on the wrong side of the road.
- (3) The revocation or suspension of a driver's license solely because of the accumulation of motor vehicle points shall not be considered a conviction.
- (4) When new operators are added to an automobile policy, their SDIP points may be added to the policy at the same time coverage is extended to them.
- (5) Points SDIP points for an operator whose license has been suspended or revoked may be added only at the date the operator again becomes eligible for license with the following exception: SDIP points may be charged at the inception date of the current policy if the operator has previously been convicted of a moving traffic violation while his license was suspended or revoked or if there is reliable evidence that the operator does, in fact, operate a motor vehicle.
- (6) If an operator dies or permanently leaves an insured's household during the policy period, his SDIP points shall be removed at the time of his death or departure.
- (7) In at-fault accidents, SDIP points for bodily injury shall not be assigned on account of payment of medical costs for diagnostic purposes if the diagnostic procedures indi-

cate that the accident did not result in bodily injury.

Statutory Authority G.S. 58-2-40; 58-36-65; 58-36-75.

.0417 DRIVE-IN CLAIM SERVICE FACILITIES

No insurer shall require any third-party claimant or insured to use a drive-in claim service operated by the insurer. The third-party claimant's or insured's voluntary utilization of a drive-in claim service shall not prejudice the right of either party to obtain independent appraisals and negotiate settlement on the basis of such appraisals.

Statutory Authority G.S. 58-2-40; 58-63-15.

.0418 TOTAL LOSSES ON MOTOR VEHICLES

The commissioner shall consider as *prima facie* violative of G.S. ~~58-51.4(11)~~ 58-63-15(11) the failure by an insurer to adhere to the following procedures concerning settlement of covered "total loss" motor vehicle claims when such failure is so frequent as to indicate a general business practice:

- (1) If the insurer and the insured or third-party claimant are initially unable to reach an agreement as to the value of the vehicle, the insurer shall base any further settlement offer not only on published regional average values of similar vehicles, but also on the value of the vehicle in the local market. As used in this Rule, "published regional average values" means those average automobile values published in guides such as but not limited to the guide book published by the National Automobile Dealers Association or similar publications; but does not include those automobile values as determined by and as identified in privately owned databases if access to such databases requires the insured or third-party claimant to pay or incur any charge or fee, such as but not limited to telephone charges or fees, or newspaper or similar media ads. Local market value shall be determined by using either the local market price of a comparable vehicle or, if no comparable vehicle can be found, quotations from at least two qualified dealers within the local market area. Additionally, if the claimant represents that the vehicle actually owned by him was in better than average condition, the insurer shall give due consideration to the condition of the claimant's vehicle prior to the accident.
- (2) Where the insurer has the right to elect to replace the vehicle and does so elect, the re-

quiries from the insured or third-party claimant shall be deemed to be a violation of this Rule.

(b) ~~No adjuster or appraiser shall~~ No claims management person, agent, limited representative, broker, adjuster, appraiser, or other insurer's representative shall:

- (1) ~~recommend the utilization of a particular motor vehicle repair service without clearly informing the claimant that he is under no obligation to use the recommended repair service and may use the service of his choice;~~
- (1) ~~(2) accept any gratuity or other form of remuneration from a repair service any provider of services; for recommending that repair service to claimants;~~
- (2) ~~(3) purchase salvage from a third-party claimant or insured whose claim he is adjusting or appraising without first disclosing to the third-party claimant or insured the nature of his interest in the transaction;~~
- (3) ~~(4) intimidate or discourage any third-party claimant or insured from seeking legal advice and counsel by withdrawing and reducing a settlement offer previously tendered to the claimant or threatening to do so if the third-party claimant or insured seeks legal advice or counsel. No adjuster shall advise a third-party claimant or insured of the advisability of seeking ~~or not~~ seeking legal counsel nor shall recommend any legal counsel to any third-party claimant or insured under any circumstance.~~

Statutory Authority G.S. 58-2-40; 58-33-10; 58-33-25; 58-33-30; 58-35-25; 58-63-15; 58-65-40.

.0424 AFTER MARKET AUTOMOBILE PARTS

(a) The purpose of this Rule is to set forth standards for prompt, fair, and equitable settlements of motor vehicle insurance claims with regard to the use of after market parts.

(b) As used in this Rule:

- (1) "After market part" means a part made by a nonoriginal manufacturer.
- (2) "Insurer" includes any person authorized to represent the insurer with respect to a claim and who is acting within the scope of the person's insurer's authority.
- (3) "Nonoriginal Manufacturer" means any manufacturer other than the original manufacturer of a part.
- (4) "Part" means a sheet metal or plastic part that generally is a component of the exte-

nor of a motor vehicle, including an inner or outer panel.

(c) No insurer shall require the use of an after market part in the repair of a motor vehicle, even if such after market part bears the stamp or seal of approval of any testing and quality certification organization or association, unless the after market part is at least equal to the original part in terms of fit, quality, performance and warranty. Insurers specifying the use of after market parts shall include in the estimate the costs of any modifications made necessary by the use of after market parts, and shall furnish and provide the insurer's written warranty that the specified after market parts are at least equal to the original part in terms of fit, quality, performance and warranty.

(d) Every insurer that writes motor vehicle insurance in this State and that intends to require or specify the use of after market parts must disclose to its policyholders in writing, either in the policy or on a sticker attached thereto, the following information in no smaller print than ten point type:

IN THE REPAIR OF YOUR COVERED AUTO UNDER THE PHYSICAL DAMAGE COVERAGE PROVISIONS OF THIS POLICY, WE MAY REQUIRE OR SPECIFY THE USE OF AUTOMOBILE PARTS NOT MADE BY THE ORIGINAL MANUFACTURER. THESE PARTS ARE REQUIRED TO BE AT LEAST EQUAL IN TERMS OF FIT, QUALITY, PERFORMANCE, AND WARRANTY TO THE ORIGINAL MANUFACTURER PARTS THEY REPLACE.

(e) An insurer must disclose to a claimant in writing, either on the estimate or on a separate document attached to the estimate, the following information in no smaller print than ten point type:

THIS ESTIMATE HAS BEEN PREPARED BASED ON THE USE OF AUTOMOBILE PARTS NOT MADE BY THE ORIGINAL MANUFACTURER. PARTS USED IN THE REPAIR OF YOUR VEHICLE BY OTHER THAN THE ORIGINAL MANUFACTURER ARE REQUIRED TO BE AT LEAST EQUAL IN TERMS OF FIT, QUALITY, PERFORMANCE, AND WARRANTY TO THE ORIGINAL MANUFACTURER PARTS THEY ARE REPLACING.

All after market parts installed on a motor vehicle shall be clearly identified on the estimate and invoice for such repair.

(f) Violations of this Rule that are so frequent as to indicate a general business practice shall be

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deemed by the Commissioner to be an unfair trade practice under Article 63 of General Statute Chapter 58.

Statutory Authority G.S. 58-2-40.

.0425 DEFINITIONS

As used in this Section the following terms shall be construed as follows:

- (1) "After market part" means a part made by a nonoriginal manufacturer.
- (2) "Insurer" includes any person authorized to represent the insurer with respect to a claim and who is acting within the scope of the person's authority.
- (3) "Nonoriginal manufacturer" means any manufacturer other than the original manufacturer of a part.
- (4) "Part" means a sheet metal or plastic part that generally is a component of the exterior of a motor vehicle, including an inner or outer panel.

Statutory Authority G.S. 58-9.

.0426 LIKE KIND AND QUALITY

No insurer shall require the use of an after market part in the repair of a motor vehicle unless the after market part is at least equal to the original part in terms of fit, quality, performance and warranty. Insurers specifying the use of after market parts shall include in the estimate the costs of any modifications made necessary by the use of after market parts.

Statutory Authority G.S. 58-9.

.0427 DISCLOSURE REQUIREMENTS

(1) Every insurer that writes motor vehicle insurance in this state and that intends to require or specify the use of after market parts must disclose to its policyholders in writing, either in the policy or on a sticker attached thereto, the following information in no smaller print than ten point type:

~~IN THE REPAIR OF YOUR COVERED AUTO UNDER THE PHYSICAL DAMAGE COVERAGE PROVISIONS OF THIS POLICY, WE MAY REQUIRE OR SPECIFY THE USE OF AUTOMOBILE PARTS NOT MADE BY THE ORIGINAL MANUFACTURER. THESE PARTS ARE REQUIRED TO BE AT LEAST EQUAL IN TERMS OF FIT, QUALITY, PERFORMANCE AND WARRANTY TO THE ORIGINAL MANUFACTURER PARTS THEY REPLACE.~~

- (b) An insurer must disclose to a claimant in writing, either on the estimate or on a separate document attached to the estimate, the following information in no smaller print than ten point type:

~~THIS ESTIMATE HAS BEEN PREPARED BASED ON THE USE OF AUTOMOBILE PARTS NOT MADE BY THE ORIGINAL MANUFACTURER. PARTS USED IN THE REPAIR OF YOUR VEHICLE BY OTHER THAN THE ORIGINAL MANUFACTURER ARE REQUIRED TO BE AT LEAST EQUAL IN TERMS OF FIT, QUALITY, PERFORMANCE AND WARRANTY TO THE ORIGINAL MANUFACTURER PARTS THEY ARE REPLACING.~~

All after market parts installed on a motor vehicle shall be clearly identified on the estimate and in voice for such repair.

Statutory Authority G.S. 58-9.

.0428 ENFORCEMENT

Violations of this Section which are so frequent as to indicate a general business practice shall be deemed by the Commissioner to be an unfair trade practice under Article 3A of General Statute Chapter 58.

Statutory Authority G.S. 58-9.

.0429 COMMINGLING

No licensed person or other person may commingle premiums, insurance deposits, or other such funds. Such funds are considered to have been received in a fiduciary capacity on behalf of policyholders. The funds must be accounted for in such a manner as to insure that the funds are separate and distinct from the person's partnership's or corporation's funds or personal accounts at all times. The accounting shall be used for premiums paid for insurers and returned premiums to policyholders. The accounting must demonstrate that funds due to companies or policyholders are available at all times.

Statutory Authority G.S. 58-2-40; 58-2-195; 58-51-10; 58-51-15.

.0430 RECORD RETENTION

Every agency, agent, broker or producer of record shall maintain a file for each policy sold, and said file shall contain all work papers and written communications in such agency's, agent's, broker's or producer of record's possession pertaining to the policy documented therein. Such file

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shall be maintained and kept for a period of three years from the date of cancellation or termination of the policy.

Statutory Authority G.S. 58-2-40; 58-65-105.

.0431 CANCELLATION OR REFUSAL TO RENEW POLICY OF AUTOMOBILE INSURANCE

The Commissioner shall consider as prima facie violative of G.S. 20-310 the failure by an insurer to comply with G.S. 20-310(f) when cancelling or refusing to renew a policy of automobile insurance; for the purpose of this Rule, the phrase "certificate of mailing", as used in G.S. 20-310(f), means a certificate issued and signed by an employee of and bearing the date stamp of the United States Postal Service.

Statutory Authority G.S. 20-310; 58-2-40; 58-63-15.

* * * * *

Notice is hereby given in accordance with G.S. 150B-21.2 that the N.C. Department of Insurance intends to adopt rules cited as 11 NCAC 17 .0001 -.0007.

The proposed effective date of this action is July 1, 1992.

The public hearing will be conducted at 2:00 p.m. on April 30, 1992 at the Dobbs Building, 3rd Floor Hearing Room, 430 North Salisbury Street, Raleigh, NC 27611.

Reason for Proposed Action: To provide for guidelines for the health insurance and Medicare counseling program for senior citizens and to facilitate the receipt of federal funds by adopting these rules for the program.

Comment Procedures: Written comments may be sent to Carla Sutt, SHIIP, P.O. Box 26387, Raleigh, NC 27611. Oral presentations may be made at the public hearing. Anyone having questions should call Carla Sutt at (919) 733-0111 or Ellen Sprenkel at (919) 733-4529.

CHAPTER 17 - SENIORS' HEALTH INSURANCE INFORMATION PROGRAM

.0001 DEFINITIONS

As used in this Chapter:

- (1) "Counselor" means a private citizen who has been trained by SHIIP employees and is certified by SHIIP to voluntarily provide counseling in accordance with this Chapter.
- (2) "Department" means the Department of Insurance of the State of North Carolina.
- (3) "SHIIP" means the Seniors' Health Insurance Information Program.
- (4) "SHIIP employee" means an employee of the Department of Insurance who is acting on behalf of SHIIP.

Statutory Authority G.S. 58-2-5; 58-2-25; 58-2-40(1); 58-54-25; 58-55-30.

.0002 PURPOSE AND DUTIES OF SHIIP

- (a) SHIIP is established within the Department as a statewide health benefits counseling program to provide Medicare beneficiaries with counseling in Medicare, private health insurance, and related health care coverage plans.
- (b) In carrying out its duties under this Chapter, SHIIP:
 - (1) Acts as a clearinghouse for information and materials relating to Medicare and health insurance.
 - (2) Develops additional information and materials relating to Medicare and health insurance, as necessary.
 - (3) Provides minimum standards and materials for training and certifying counselors.
 - (4) Provides information for health insurance educational activities that are conducted by employers, senior organizations, and other interested groups.
 - (5) Supports, to the extent possible, additional emphasis on expansion of community educational activities that would provide for announcements on television and in other media that briefly describe the nature of Medicare, Medicare supplement insurance, and long-term care insurance, and the availability of consumer information and materials under this Chapter.
 - (6) Provides community education on Medicare, Medicare supplement insurance, and long-term care insurance.
 - (7) Recruits, trains, and coordinates counselors.
 - (8) Assists individuals and provides informal advocacy with respect to Medicare and health insurance benefits claims.

Statutory Authority G.S. 58-2-5; 58-2-25; 58-2-40(1); 58-54-25; 58-55-30.

.0003 LOCATION, MAILING ADDRESS, AND TELEPHONE

PROPOSED RULES

(a) The primary location of SHIIP is 1600 Hillsborough Street, Raleigh, North Carolina 27605.

(b) The mailing address of SHIIP is Post Office Box 26387, Raleigh, North Carolina, 27611.

(c) The telephone numbers for SHIIP are toll-free 1-800-443-9354 and 1-919-733-0111.

Statutory Authority G.S. 58-2-5; 58-2-25; 58-2-40(1); 58-54-25; 58-55-30.

.0004 COUNSELORS

(a) Counselors shall not engage in the solicitation of insurance sales. Licensed insurance agents and employees of insurance companies are not eligible for training and certification as counselors by SHIIP.

(b) No counselor shall provide counseling services under this Chapter unless he or she has been trained and certified by SHIIP.

(c) Before providing any counseling services, counselors shall disclose, in writing, to recipients of counseling services pursuant to this Chapter that the counselors are acting in good faith to provide information about the Medicare program and about health insurance policies and benefits on a volunteer basis, but that the information shall not be construed to be legal advice.

(d) Counselors shall not endorse any particular insurance company or insurance agency, agent, broker, brokerage firm, or other private provider of health insurance.

(e) Counselors shall keep all consultations with recipients of counseling services confidential, except for filing of reports with SHIIP employees.

Statutory Authority G.S. 58-2-5; 58-2-40(1); 58-54-25; 58-55-30.

.0005 SHIIP INQUIRIES TO INSURERS AND AGENTS

Every insurer and agent or broker, upon receipt of an oral or written inquiry from a SHIIP employee, shall furnish the employee with a complete and accurate response in writing, unless the response is specifically authorized by the employee to be given orally. The response must be made by the insurer, agent, or broker within seven calendar days after receipt of the request; except that the employee may extend this time period in an individual case.

Statutory Authority G.S. 58-2-5; 58-2-40(1); 58-2-190; 58-2-195; 58-54-25; 58-55-30.

.0006 MEDICARE SUPPLEMENT POLICIES

All Medicare supplement insurance policy forms that have been approved by the Life and Health Division of the Department are on file in the offices of SHIIP. Copies of these policy forms are available as soon as practicable after request therefor and payment of the copying fee specified in G.S. 58-6-5(3).

Statutory Authority G.S. 58-2-5; 58-2-40(1); 58-6-5(3); 58-54-25.

.0007 BUYER'S GUIDE

The Guide to Health Insurance for People with Medicare, as published by the National Association of Insurance Commissioners, or any successor publication, is available from SHIIP to consumers, free of charge. Licensed insurance agents and employees of insurance companies shall obtain this publication from the insurance companies by which they are appointed or employed.

Statutory Authority G.S. 58-2-5; 58-2-40(1); 58-54-25; 58-55-30.

TITLE 15A - DEPARTMENT OF ENVIRONMENT, HEALTH, AND NATURAL RESOURCES

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Wildlife Resources Commission intends to amend rule(s) cited as 15A NCAC 10C .0305.

The proposed effective date of this action is July 1, 1992.

The public hearing will be conducted at 7:00 p.m. on April 30, 1992 at the South Iredell High School Auditorium, Troutman, NC.

Reason for Proposed Action: To protect the striped bass population in Lake Norman.

Comment Procedures: Interested persons may present their views either orally or in writing at the hearing. In addition, the record of hearing will be open for receipt of written comments from April 15, 1992 to May 15, 1992. Such written comments must be delivered or mailed to the N.C. Wildlife Resources Commission, 512 N. Salisbury St., Raleigh, NC 27604-1188.

CHAPTER 10 - WILDLIFE RESOURCES AND WATER SAFETY

SUBCHAPTER 10C - INLAND FISHING REGULATIONS

PROPOSED RULES

SECTION .0300 - GAME FISH

.0305 OPEN SEASONS: CREEL AND SIZE LIMITS

(a) Generally. Subject to the exceptions listed in Paragraph (b) of this Rule, the open seasons and creel and size limits are as indicated in the following table:

| GAME FISHES | DAILY CREEL LIMITS | MINIMUM SIZE LIMITS | OPEN SEASON |
|---|------------------------------|--------------------------------|--|
| Mountain Trout: | | | |
| Wild Trout Waters | 4 | 7 in. (exc. 15) | All year (exc. 2) |
| Hatchery Supported Trout Waters | 7 | None | All year, except March 1 to 7:00 a.m. on first Saturday in April (excs. 2 & 3) |
| Muskellunge and Tiger Musky | 2 | 30 in. | ALL YEAR |
| Chain Pickerel (Jack) | None | None | ALL YEAR |
| Walleye | 8 (excs. 9 & 10) | None (exc. 9) | ALL YEAR |
| Sauger | 8 | 15 in. | ALL YEAR |
| Black Bass: | | | |
| Largemouth | 5 (exc. 10) | 14 in. (excs. 4, 8 & 11) | ALL YEAR (exc. 13) |
| Smallmouth and Spotted | 5 (exc. 10) | 12 in. (excs. 4, 8 & 11) | ALL YEAR |
| White Bass | 25 | None | ALL YEAR |
| Sea Trout (Spotted or Speckled) | None | 12 in. | ALL YEAR |
| Flounder | None | 13 in. | ALL YEAR |
| Red drum (channel bass, red fish, puppy drum) | None | 14 in. | ALL YEAR |
| Striped Bass and their hybrids (Morone Hybrids) | 8 aggregate (excs. 1 & 6) | 16 in. (excs. 1, 6 & 12) | ALL YEAR (excs. 6 & 16) |
| Kokanee Salmon | 7 | None | ALL YEAR |
| Panfishes | None | None | ALL YEAR |

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| | (excs. 5 & 14) | (exc. 14) | (exc. 5) |
|----------------|----------------|-----------|----------------------|
| NONGAME FISHES | None | None | ALL YEAR (exc. 7) |

(b) Exceptions

- (1) In the Dan River upstream from its confluence with Bannister River to the Brantly Steam Plant Dam, ~~and~~ in John H. Kerr, Gaston, and Roanoke Rapids Reservoirs, ~~and~~ Lake Norman, the creel limit on striped bass and Morone hybrids is four in the aggregate and the minimum size limit is 20 inches.
- (2) In designated public mountain trout waters the season for taking all species of fish is the same as the trout fishing season. There is no closed season on taking trout from Nantahala River and all tributaries (excluding impoundments) upstream from Nantahala Lake, and the impounded waters of power reservoirs and municipally-owned water supply reservoirs open to the public for fishing.
- (3) Under an agreement with Tennessee, the minimum size limit on trout in Calderwood Reservoir is seven inches.
- (4) Bass taken from streams designated as public mountain trout waters or from Calderwood Reservoir may be retained without restriction as to size limit.
- (5) On Mattamuskeet Lake, special federal regulations apply.
- (6) In the inland fishing waters of Cape Fear, Neuse and Tar Rivers and their tributaries extending upstream to the first impoundment, the daily creel limit for striped bass and their hybrids is one fish and the minimum length limit is 18 inches. In the Roanoke River up to the first impoundment, from July 1 through March 31 and June 1 through June 30 the daily creel limit for striped bass is one fish and the minimum length limit is 18 inches; from April 1 to May 31 the daily creel limit is three fish, no fish between the lengths of 22 inches and 27 inches may be retained, and the minimum length limit is 16 inches, except no fish may be retained in Roanoke River and its tributaries including Cashie, Middle and Eastmost rivers from May 1 to December 31, 1991.
- (7) See 15A NCAC 10C .0407 for open seasons for taking nongame fishes by special devices.
- (8) The maximum combined number of black bass of all species that may be retained per day is five fish, no more than two of which may be smaller than the applicable minimum size limit. The minimum size limit for all species of black bass is 14 inches, with no exception in Lake Luke Marion in Moore County, in Reedy Creek Park lakes in Mecklenburg County, and in Currituck Sound and tributaries north of Wright Memorial Bridge; in North River and tributaries in Currituck and Camden Counties north of a line between Camden Point and the end of SR 1124. In and west of Madison, Buncombe, Henderson and Polk Counties the minimum size limit is 12 inches. In B. Everett Jordan Reservoir a minimum size limit of 16 inches, with no exception, applies to largemouth bass. In Falls of Neuse Reservoir, east of SR 1004, Sutton Lake and Tuckertown Lake no black bass between the lengths of 12 inches and 16 inches may be retained, and the minimum size limit for black bass is 16 inches, except that the daily creel may contain two black bass of less than 12 inches in length. In W. Kerr Scott Reservoir there is no minimum size limit for spotted bass.
- (9) A minimum size limit of 15 inches applies to walleye taken from Lake James and its tributaries, and the daily creel limit for walleye is four fish in Linville River upstream from the NC 126 bridge above Lake James.
- (10) The creel limit for black bass and walleye taken from Calderwood Reservoir is 10.
- (11) The minimum size limit for all black bass, with no exception, is 18 inches in the following trophy bass lakes:
 - (A) Cane Creek Lake in Union County; and
 - (B) Lake Thom-A-Lex in Davidson County.
- (12) In all impounded inland waters and their tributaries, except those waters described in Exceptions (1), the daily creel limit of striped bass and their hybrids may include not more than two fish of smaller size than the minimum size limit.
- (13) In Cane Creek Reservoir (Orange County) the season for taking largemouth bass is closed.
- (14) In Lake Tillery, Falls Lake, Badin Lake, and Tuckertown Lake a daily creel limit of 20 fish and a minimum size limit of 8 inches apply to crappie.

- (15) In Slick Rock Creek the minimum size is 7 inches for brook trout and 10 inches for brown and rainbow trout.
- (16) In designated inland fishing waters of Roanoke Sound, Croatan Sound, Albemarle Sound, Chowan River, Currituck Sound, Alligator River, Scuppernong River, and their tributaries (excluding the Roanoke River and Cashie River and their tributaries), striped bass fishing season is closed when adjacent joint or coastal fishing waters are closed to hook and line fishing for striped bass by the Marine Fisheries Commission.

Statutory Authority G.S. 113-134; 113-292; 113-304; 113-305.

* * * * *

Notice is hereby given in accordance with G.S. 150B-21.2 that the Environment, Health, and Natural Resources, Division of Radiation Protection intends to amend rule cited as 15A NCAC 11 .0352.

The proposed effective date of this action is October 1, 1992.

Instructions on How to Demand a Public Hearing: Any person requesting that the Radiation Protection Commission hold a public hearing on this proposed amendment must submit a written request by April 30, 1992. The request must be submitted to Richard Fry, Division of Radiation Protection, P.O. Box 27687, Raleigh, NC 27611-7687.

Reason for Proposed Action: This amendment is necessary for North Carolina licensees to be compatible with the US Nuclear Regulatory Commission's rules. The proposed text was inadvertently omitted by the agency when the rule was published in the North Carolina Register dated December 16, 1991.

Comment Procedures: Written comments should be submitted to the Division of Radiation Protection, P.O. Box 27687, Raleigh, North Carolina 27611-7687. Written comments will be accepted until May 15, 1992. Any person requesting information concerning this proposed amendment should contact Richard M. Fry at (919) 571-4141.

Editor's Note: This Rule has been adopted by the Radiation Protection Commission and is pending review by the Rules Review Commission for a proposed effective date of May 1, 1992.

CHAPTER 11 - RADIATION PROTECTION

SECTION .0300 - LICENSING OF RADIOACTIVE MATERIAL

.0352 EMERGENCY PLANS

(a) Each application to possess radioactive materials in unsealed form, on foils or plated sources, or sealed in glass in excess of the quantities in the table in Subparagraph (e)(1) of this Rule must contain either:

- (1) an evaluation showing that the maximum dose to a person off-site due to a release of radioactive materials would not exceed one rem effective dose equivalent or five rems to the thyroid; or
- (2) an emergency plan for responding to a release of radioactive material.

(b) One or more of the following factors may be used to support an evaluation submitted under Subparagraph (a)(1) of this Rule:

- (1) the radioactive material is physically separated so that only a portion could be involved in an accident;
- (2) all or part of the radioactive material is not subject to release during an accident because of the way its is stored or packaged;
- (3) the release fraction in the respirable size range would be lower than the release fraction shown in Subparagraph (e)(1) of this Rule due to the chemical or physical form of the material;
- (4) the solubility of the radioactive material would reduce the dose received;
- (5) facility design or engineered safety features in the facility would cause the release fraction to be lower than shown in Subparagraph (e)(1) of this Rule;
- (6) operating restrictions or procedures would prevent a release fraction as large as that shown in Subparagraph (e)(1) of this Rule; or
- (7) other factors appropriate for the specific facility.

(c) An emergency plan for responding to a release of radioactive material submitted under Subparagraph (a)(2) of this Rule must include the following information:

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- (1) brief description of the licensee's facility and area near the site;
- (2) identification of each type of radioactive materials accident for which protective actions may be needed;
- (3) classification system for classifying accidents as alerts or site area emergencies;
- (4) identification of the means of detecting each type of accident in a timely manner;
- (5) brief description of the means and equipment for mitigating the consequences of each type of accident, including those provided to protect workers on-site, and a description of the program for maintaining the equipment;
- (6) brief description of the methods and equipment to assess releases of radioactive materials;
- (7) brief description of the responsibilities of licensee personnel, should an accident occur, including identification of personnel responsible for promptly notifying off-site response organizations and the agency, and responsibilities for developing, maintaining, and updating the plan;
- (8) brief description of notification and coordination, to include a commitment to and a brief description of the means to promptly notify off-site response organizations and request off-site assistance, including medical assistance for the treatment of contaminated injured on-site workers when appropriate, provided that:
 - (A) a control point shall be established;
 - (B) the notification and coordination shall be planned so that unavailability of some personnel, parts of the facility, and some equipment will not prevent the notification and coordination;
 - (C) the licensee shall also commit to notify the agency immediately after notification of the appropriate off-site response organizations, not to exceed one hour after the licensee declares an emergency; and
 - (D) the reporting requirements in Subparagraph (c)(8) of this Rule do not substitute for or relieve the licensee from responsibility for complying with the requirements in the Emergency Planning and Community Right-to-Know Act of 1986, Title III, Public Law 99-499 or other state or federal reporting requirements;
- (9) brief description of the types of information on facility status, radioactive releases, and recommended protective actions, if necessary, to be given to off-site response organizations and to the agency;
- (10) brief description of the frequency, performance objectives and plans for the training that the licensee will provide workers on how to respond to an emergency, including any special instructions and orientation tours the licensee would offer to fire, police, medical and other emergency personnel, where such training shall:
 - (A) familiarize personnel with site-specific emergency procedures; and
 - (B) thoroughly prepare site personnel for their responsibilities in the event of accident scenarios postulated as most probable for the specific site, including the use of team training for such scenarios;
- (11) brief description of the means of restoring the facility to a safe condition after an accident;
- (12) brief description of provisions for conducting quarterly communications checks with off-site response organizations and biennial on-site exercises to test response to simulated emergencies where such provisions shall meet the following specific requirements:
 - (A) quarterly communications checks with off-site response organizations shall include the check and update of all necessary telephone numbers;
 - (B) while participation of off-site response organizations in biennial exercises is encouraged but not required, the licensee shall invite off-site response organizations to participate in the biennial exercises;
 - (C) accident scenarios for biennial exercises shall not be known to most exercise participants;
 - (D) the licensee shall critique each exercise using individuals who do not have direct implementation responsibility for the plan; and
 - (E) critiques of exercises shall evaluate the appropriateness of the plan, emergency procedures, facilities, equipment, training of personnel, and overall effectiveness of the response; and
 - (F) deficiencies found by the critiques in Subparagraph (c)(12)(E) of this Rule shall be corrected;
- (13) certification that the applicant has met its responsibilities under the Emergency Planning and Community Right-to-Know Act of 1986, Title III, Public Law 99-499, if applicable to the applicant's activities at the proposed place of use of the radioactive material.

(d) The licensee shall allow the off-site response organizations expected to respond in case of an accident 60 days to comment on the licensee's emergency plan before submitting it to the agency. The

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licensee shall provide any comments received within the 60 day comment period to the agency with the emergency plan.

(e) Quantities of radioactive material requiring consideration of the need for an emergency plan for responding to a release as used in this Rule and special instructions for use are:

(1) TABLE

| RADIOACTIVE MATERIAL | RELEASE FRACTION | QUANTITY (CURIES) |
|---------------------------|------------------|-------------------|
| Actinium-228 | 0.001 | 4,000 |
| Americium-241 | .001 | 2 |
| Americium-242 | .001 | 2 |
| Americium-243 | .001 | 2 |
| Antimony-124 | .01 | 4,000 |
| Antimony-126 | .01 | 6,000 |
| Barium-133 | .01 | 10,000 |
| Barium-140 | .01 | 30,000 |
| Bismuth-207 | .01 | 5,000 |
| Bismuth-210 | .01 | 600 |
| Cadmium-109 | .01 | 1,000 |
| Cadmium-113 | .01 | 80 |
| Calcium-45 | .01 | 20,000 |
| Californium-252 | .001 | 9 (20 mg) |
| <u>Carbon-14 (NON CO)</u> | .01 | 50,000 |
| Cerium-141 | .01 | 10,000 |
| Cerium-144 | .01 | 300 |
| Cesium-134 | .01 | 2,000 |
| Cesium-137 | .01 | 3,000 |
| Chlorine-36 | .5 | 100 |
| Chromium-51 | .01 | 300,000 |
| Cobalt-60 | .001 | 5,000 |
| Copper-64 | .01 | 200,000 |
| Curium-242 | .001 | 60 |
| Curium-243 | .001 | 3 |
| Curium-244 | .001 | 4 |
| Curium-245 | .001 | 2 |
| Europium-152 | .01 | 500 |
| Europium-154 | .01 | 400 |
| Europium-155 | .01 | 3,000 |
| Germanium-68 | .01 | 2,000 |
| Gadolinium-153 | .01 | 5,000 |
| Gold-198 | .01 | 30,000 |
| Hafnium-172 | .01 | 400 |
| Hafnium-181 | .01 | 7,000 |
| Holmium-166 m | .01 | 100 |
| Hydrogen-3 | .5 | 20,000 |
| Iodine-125 | .5 | 10 |
| Iodine-131 | .5 | 10 |
| Indium-114 m | .01 | 1,000 |
| Iridium-192 | .001 | 40,000 |
| Iron-55 | .01 | 40,000 |
| Iron-59 | .01 | 7,000 |
| Krypton-85 | 1.0 | 6,000,000 |
| Lead-210 | .01 | 8 |
| Manganese-56 | .01 | 60,000 |
| Mercury-203 | .01 | 10,000 |
| Molybdenum-99 | .01 | 30,000 |
| Neptunium-237 | .001 | 2 |

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| | | |
|--|--------------|----------------|
| <u>Nickel-63</u> | <u>.01</u> | <u>20,000</u> |
| <u>Niobium-94</u> | <u>.01</u> | <u>300</u> |
| <u>Phosphorus-32</u> | <u>.5</u> | <u>100</u> |
| <u>Phosphorus-33</u> | <u>.5</u> | <u>1,000</u> |
| <u>Polonium-210</u> | <u>.01</u> | <u>10</u> |
| <u>Potassium-42</u> | <u>.01</u> | <u>9,000</u> |
| <u>Promethium-145</u> | <u>.01</u> | <u>4,000</u> |
| <u>Promethium-147</u> | <u>.01</u> | <u>4,000</u> |
| <u>Ruthenium-106</u> | <u>.01</u> | <u>200</u> |
| <u>Samarium-151</u> | <u>.01</u> | <u>4,000</u> |
| <u>Scandium-46</u> | <u>.01</u> | <u>3,000</u> |
| <u>Selenium-75</u> | <u>.01</u> | <u>10,000</u> |
| <u>Silver-110 m</u> | <u>.01</u> | <u>1,000</u> |
| <u>Sodium-22</u> | <u>.01</u> | <u>9,000</u> |
| <u>Sodium-24</u> | <u>.01</u> | <u>10,000</u> |
| <u>Strontium-89</u> | <u>.01</u> | <u>3,000</u> |
| <u>Strontium-90</u> | <u>.01</u> | <u>90</u> |
| <u>Sulfur-35</u> | <u>.5</u> | <u>900</u> |
| <u>Technetium-99</u> | <u>.01</u> | <u>10,000</u> |
| <u>Technetium-99 m</u> | <u>.01</u> | <u>400,000</u> |
| <u>Tellurium-127 m</u> | <u>.01</u> | <u>5,000</u> |
| <u>Tellurium-129 m</u> | <u>.01</u> | <u>5,000</u> |
| <u>Terbium-160</u> | <u>.01</u> | <u>4,000</u> |
| <u>Thulium-170</u> | <u>.01</u> | <u>4,000</u> |
| <u>Tin-113</u> | <u>.01</u> | <u>10,000</u> |
| <u>Tin-123</u> | <u>.01</u> | <u>3,000</u> |
| <u>Tin-126</u> | <u>.01</u> | <u>1,000</u> |
| <u>Titanium-44</u> | <u>.01</u> | <u>100</u> |
| <u>Vanadium-48</u> | <u>.01</u> | <u>7,000</u> |
| <u>Xenon-133</u> | <u>1.0</u> | <u>900,000</u> |
| <u>Yttrium-91</u> | <u>.01</u> | <u>2,000</u> |
| <u>Zinc-65</u> | <u>.01</u> | <u>5,000</u> |
| <u>Zirconium-93</u> | <u>.01</u> | <u>400</u> |
| <u>Zirconium-95</u> | <u>.01</u> | <u>5,000</u> |
| <u>Any other beta-gamma emitter</u> | <u>.01</u> | <u>10,000</u> |
| <u>Mixed fission products</u> | <u>.01</u> | <u>1,000</u> |
| <u>Mixed corrosion products</u> | <u>.01</u> | <u>10,000</u> |
| <u>Contaminated equipment beta-gamma</u> | <u>.001</u> | <u>10,000</u> |
| <u>Irradiated material, any form other than solid noncombustible</u> | <u>.01</u> | <u>1,000</u> |
| <u>Irradiated material, solid noncombustible</u> | <u>.001</u> | <u>10,000</u> |
| <u>Mixed radioactive waste, beta-gamma</u> | <u>.01</u> | <u>1,000</u> |
| <u>Packaged mixed waste, beta-gamma</u> | <u>.001</u> | <u>10,000</u> |
| <u>Any other alpha emitter</u> | <u>.001</u> | <u>2</u> |
| <u>Contaminated equipment, alpha</u> | <u>.0001</u> | <u>20</u> |
| <u>Packaged waste, alpha</u> | <u>.0001</u> | <u>20</u> |

(2) For combinations of radioactive materials, consideration of the need for an emergency plan is required if the sum of the ratios of the quantity of each radioactive material authorized to the quantity listed for that material in the table in Subparagraph (e)(1) of this Rule exceeds one.

(3) Waste packaged in Type B containers, as defined in 10 CFR Part 71.4, does not require an emergency plan.

Statutory Authority G.S. 104E-7; 104E-18.

* * * * *

Notice is hereby given in accordance with G.S. 150B-21.2 that DEHNR - Division of Epidemiology intends to amend rule(s) cited as 15A NCAC 19H .0401 - .0403, .0601, .0903.

The proposed effective date of this action is July 1, 1992.

The public hearing will be conducted at 10:00 a.m. on May 12, 1992 at the Norton Board Room, 6th Floor Cooper Memorial Building, 225 N. McDowell Street, Raleigh, N.C.

Reasons for Proposed Actions:

15A NCAC 19H .0401 - .0403 - to increase the requirements for filing delayed birth certificates for minor children.

15A NCAC 19H .0601, .0903 - to eliminate information concerning amendments to a certificate from a certified copy.

Comment Procedures: Any person requiring additional information concerning the proposed rules should contact Helen A. Simmons, Vital Records Section, P.O. Box 29537, Raleigh, NC 27626-0537, (919) 733-3000. Written comments on these rules may be sent to Ms. Simmons at the above address, or submitted at the public hearing. If you desire to speak at the public hearing, notify Ms. Simmons at least 3 days prior to the public hearing.

CHAPTER 19 - HEALTH: EPIDEMIOLOGY

SUBCHAPTER 19H - VITAL RECORDS

SECTION .0400 - DELAYED REGISTRATION OF BIRTHS

.0401 GENERAL REQUIREMENTS

All certificates registered one or more years after the date of birth are to be registered on a Delayed Certificate of Birth Form prescribed by the State Registrar. Any living person born in this state whose birth is not recorded, or his parent, or guardian ~~next of kin, or elder person acting for the registrant~~ may apply to the register of deeds in the county of birth on a form prescribed by the State Registrar. Such completed application form shall be retained by the register of deeds.

Statutory Authority G.S. 130A-92(7).

.0402 DOCUMENTARY EVIDENCE: FACTS TO BE ESTABLISHED

(a) The minimum facts which must be established by documentary evidence shall be:

- (1) the full name of the person at the time of birth;
- (2) the date and place of birth;
- (3) the full maiden name of the mother; and
- (4) the full name of the father, except for births out of wedlock.

Documents presented, other than personal affidavits, to establish these facts must be from independent sources and shall be in the form of the original record or a duly certified copy thereof or a signed statement from the custodian. These documents must have been established at least five years prior to the date of application. However, documents established less than five years prior to date of application shall be accepted if created prior to the applicant's fifth birthday.

(b) An affidavit of personal knowledge, to be acceptable, must be signed by one of the parents, or a person older than the registrant having knowledge of the facts of birth before an official authorized to administer oaths.

(c) For applicants 1 to 11 years old, two pieces of documentary evidence are required, only one of which may be an affidavit. Both records must prove name, ~~and~~ date of birth, ~~At least one must prove~~ parentage, and ~~one must prove~~ place of birth.

(d) For applicants 12 and over, three pieces of evidence are required, only one of which may be an affidavit. All three must prove name and date of birth, two must prove place of birth, and one must prove parentage.

(e) All evidence shall be abstracted or included with the application and must be signed by the appropriate official. The application and affidavits of personal knowledge shall be retained by the register of deeds for one year. Other supporting documents may be returned to the applicant upon completion of the certificate.

Statutory Authority G.S. 130A-92(7).

.0403 COMPLETION OF THE CERTIFICATE

(a) Upon proper submission of application and supporting evidence, the register of deeds shall abstract on the delayed certificate of birth a description of each document submitted to support the facts shown on the delayed birth certificate. The description shall include:

- (1) the title or description of the document;
- (2) the name and address of the affiant, if the document is an affidavit; or of the custodian, if the document is an original or

PROPOSED RULES

certified copy of a record or a signed statement;

(3) the date of the original filing of the document being abstracted; and

(4) the information regarding the birth facts supported by the document.

(b) Each delayed certificate of birth shall be signed and sworn to before an official authorized to administer oaths by the person whose birth is to be registered if such person is 18 years of age and is competent to sign. Otherwise, the certificate shall be signed and sworn to by ~~one of the following in the indicated order of priority:~~

(+) one of the parents or guardians of the registrant.

(2) ~~the next of kin of the registrant, or~~

(3) ~~any other older person having personal knowledge of the facts of birth.~~

Statutory Authority G.S. 130A-92(7).

SECTION .0600 - CERTIFIED COPIES

.0601 BIRTH CERTIFICATES

(a) There shall be three forms of copies of birth certificates:

(1) a photocopy of the original record excluding medical and health related information with facsimile of the signature of the State Registrar and raised seal and date issued; and

(2) a typed copy prepared on a form printed on safety paper with facsimile of the signature of the State Registrar and raised seal; the form shall provide at least the following items of information:

(A) name and sex of child;

(B) date and place of birth;

(C) names, ages (at time of birth), and birthplaces of father and mother;

(D) date filed with local registrar;

(E) certificate number; and

(F) date of issue; and

(G) ~~items amended and date of amendment, and~~

(3) a typed wallet-size card with facsimile of the signature of the State Registrar providing as a minimum the following items of information:

(A) name and sex of child;

(B) date and place of birth;

(C) date filed with local registrar;

(D) certificate number;

(E) date of issue; and

(F) changes of names by court order noted on back for persons older than 15 years

unless good cause is shown for deleting the notation.

(b) A wallet-size card shall be issued when specifically requested.

(c) A typed copy shall be issued when specifically requested, when the original certificate cannot be photocopied, when the original has been corrected or amended, or when the record is that of an adopted or legitimated person.

(d) A photocopy shall be issued when specifically requested or whenever it is most convenient except in cases in which a typed copy is required.

(e) In cases when the individual is known to be deceased, the word "DECEASED" shall be added to the certificate in a prominent location. This procedure shall apply to copies issued by the Vital Records Section and to each register of deeds or local health department that issues certified copies of birth certificates.

Statutory Authority G.S. 130A-92(7).

SECTION .0900 - CORRECTIONS AND AMENDMENTS

.0903 CORRECTIONS REQUIRING PROOF

The following items may be corrected upon written request on forms prescribed by the State Registrar properly notarized and signed by the registrant if of legal age or by one or both parents or guardians of a minor child provided that the request is supported by at least one piece of documentary evidence:

(1) state of birth (deaths),
(2) birthplace of parents (births),
(3) county of birth,
(4) spelling of given names of child (births) after four years of birth,
(5) spelling of father's or mother's name,
(6) age of parents,
(7) sex of child if incorrectly recorded,
(8) date of birth, and
(9) hour of birth.

~~For these corrections, except sex of child and hour of birth, the certificates shall be marked "amended" as shall certified copies subsequently issued.~~ All available evidence including any which might not have been submitted by the applicant shall be evaluated by the State Registrar. The existence of inconsistent or conflicting evidence may be considered cause for denying any request for correction in which case the applicant shall be duly advised.

Statutory Authority G.S. 130A-92(7).

**TITLE 19A - DEPARTMENT OF
TRANSPORTATION**

Notice is hereby given in accordance with G.S. 150B-21.2 that the Division of Motor Vehicles intends to adopt rule(s) cited as 19A NCAC 3B .0801.

The proposed effective date of this action is July 1, 1992.

Instructions on how to demand a public hearing (must be requested in writing within 15 days of notice): The agency will schedule a public hearing on the proposed rule if it receives a written request for a hearing within 15 days from the date the proposed text is published. The request for hearing should be mailed to: William R. Stout, Motor Carrier Safety Unit, Division of Motor Vehicles, 1100 New Bern Avenue, Raleigh, NC 27697.

Reason for Proposed Action: To further define gross vehicle weight rating in the absence of the manufacturer's label.

Comment Procedures: Written comments on the proposed rule may be submitted by mailing the comments to the following address within 30 days after the proposed text is published or until a public hearing is held, whichever is longer: William R. Stout, Motor Carrier Safety Unit, 1100 New Bern Avenue, Raleigh, NC 27697.

CHAPTER 3 - DIVISION OF MOTOR VEHICLES

SUBCHAPTER 3B - DRIVER LICENSE SECTION

SECTION .0800 - GROSS VEHICLE WEIGHT RATING (GVWR)

.0801 DEFINITION

The value specified by the manufacturer as the maximum loaded weight of a vehicle. The GVWR of a combination vehicle is the GVWR of the power unit plus the GVWR of the towed unit or units. In the absence of the manufacturer's GVWR label affixed to the vehicle, the registered weight or the actual weight, whichever is greater, shall be the GVWR.

Statutory Authority G.S. 20-37.22.

* * * * *

Notice is hereby given in accordance with G.S. 150B-21.2 that the Division of Motor Vehicles intends to amend rule(s) cited as 19A NCAC 3D .0515.

The proposed effective date of this action is July 1, 1992.

Instructions on how to demand a public hearing (must be requested in writing within 15 days of notice): The agency will schedule a public hearing on the proposed rule if it receives a written request for a hearing within 15 days from the date the proposed text is published. The request for hearing should be mailed to: E.C. Bristle, Enforcement Section, Division of Motor Vehicles, 1100 New Bern Avenue, Raleigh, NC 27697.

Reason for Proposed Action: To establish the duration of a suspension or revocation of a Safety Equipment or Safety Equipment Exhaust Emissions Inspection Station License based upon a point system.

Comment Procedures: Written comments on the proposed rule may be submitted by mailing the comments to the following address within 30 days after the proposed text is published or until a public hearing is held, whichever is longer: E.C. Bristle, Enforcement Section, Division of Motor Vehicles, 1100 New Bern Avenue, Raleigh, NC 27697.

CHAPTER 3 - DIVISION OF MOTOR VEHICLES

SUBCHAPTER 3D - ENFORCEMENT SECTION

SECTION .0500 - GENERAL INFORMATION REGARDING SAFETY INSPECTION OF MOTOR VEHICLES

.0515 SAFETY INSPECTION LICENSING AND PROCEDURES

(a) The Director of the Office of Administrative Hearings has determined that publication of the complete regulations governing licensing as a North Carolina Safety Equipment Inspection Station, and the requirements and procedures for such inspections are impracticable, and that the substance of this Rule should be summarized in accordance with the provisions of G.S. 150B-63(e) 26 NCAC 2A .0207.

(b) The regulations and procedures governing the licensing of Safety Equipment Inspection Stations for all counties are contained in a manual entitled "Safety Equipment Emission Inspections, Windshield Certificate Replacement

PROPOSED RULES

Regulations Manual," as amended July 1, 1992. This manual includes all procedures and forms to be used in the process of the safety inspection required by law.

(c) Official copies of these manuals are available upon request from the Enforcement Section, Division of Motor Vehicles, Department of Transportation, 1100 New Bern Avenue, Raleigh, N.C. 27697.

Statutory Authority G.S. 20-1; 20-117.1(a); 20-122; 20-122.1; 20-123.1; 20-124; 20-125; 20-125.1; 20-126; 20-127; 20-128; 20-128.1; 20-129; 20-129.1; 20-130; 20-130.1; 20-130.2; 20-130.3; 20-131 through 20-134; 20-183.2; 20-183.3; 20-183.4; 20-183.5; 20-183.6; 20-183.7; 20-183.8.

* * * * *

Notice is hereby given in accordance with G.S. 150B-21.2 that the Division of Motor Vehicles intends to amend rule(s) cited as 19A NCAC 3D .0801.

The proposed effective date of this action is July 1, 1992.

Instructions on how to demand a public hearing (must be requested in writing within 15 days of notice): The agency will schedule a public hearing on the proposed rule if it receives a written request for a hearing within 15 days from the date the proposed text is published. The request for hearing should be mailed to: William A. Cox, Driver License Section, 1100 New Bern Avenue, Raleigh, NC 27697.

Reason for Proposed Action: 19A NCAC 3D .0801(b)(2) states the Division's Exemption Review Officer may approve anyone for a commercial drivers license when they fail to meet the Federal Motor Carrier Safety Regulations Part 391.11(b)(1) and 391.41(b)(1) through (11), provided they meet our State Standards. It is requested that this regulation continue to allow this Authority indefinitely.

Comment Procedures: Written comments on the proposed rule may be submitted by mailing the comments to the following address within 30 days after the proposed text is published or until a public hearing is held, whichever is longer: William A. Cox, NC Division of Motor Vehicles, Driver License Section, 1100 New Bern Avenue, Raleigh, North Carolina 27697.

Editor's Note: This Rule has been filed as a temporary rule effective March 30, 1992 for a period of 180 days to expire on September 26, 1992.

CHAPTER 3 - DIVISION OF MOTOR VEHICLES

SUBCHAPTER 3D - ENFORCEMENT SECTION

SECTION .0800 - SAFETY RULES AND REGULATIONS

.0801 SAFETY OF OPERATION AND EQUIPMENT

(a) The rules and regulations adopted by the U.S. Department of Transportation relating to safety of operation and equipment (49 CFR Parts 390-398 and amendments thereto) shall apply to all for-hire motor carrier vehicles, whether common carriers, contract carriers or exempt carriers and all private motor carriers, while engaged in interstate commerce over the highways of the State of North Carolina.

(b) The rules and regulations adopted by the U.S. Department of Transportation relating to safety of operation and equipment (49 CFR Parts 390-398 and amendments thereto) shall apply to all for-hire motor carrier vehicles, whether common carriers, contract carriers or exempt carriers and all private motor carrier vehicles engaged in intrastate commerce over the highways of the State of North Carolina if such vehicles have a GVWR of greater than 26,000 pounds; are designed to transport 16 or more passengers, including the driver; or transport hazardous materials required to be placarded pursuant to 49 CFR 170-190. Provided, the following exceptions shall also apply to all intrastate motor carriers:

- (1) An intrastate motor carrier driver may not drive more than 12 hours following eight consecutive hours off duty; or for any period after having been on duty 16 hours following eight consecutive hours off duty; or after having been on duty 70 hours in seven consecutive days; or more than 80 hours in eight consecutive days. An intrastate driver will be determined by his previous seven days of operation.
- (2) Persons who otherwise qualify medically to operate a commercial motor vehicle within the State of North Carolina will be exempt from the provisions of Part 391.11(b)(1) and Part 391.41(b)(1) through (11) and therefore will be authorized for intrastate operation if licensed prior to March 30, 1992, are approved by

an Exemption Review Officer appointed by the Commissioner of Motor Vehicles. ~~and meet all other requirements of this Section.~~ These drivers shall continue to be exempt upon completion of a biennial medical examination indicating the condition has not worsened or no new disqualifying conditions have been diagnosed and upon continued approval of an Exemption Review Officer.

(c) The rules and regulations adopted by the U. S. Department of Transportation relating to inspection, repair and maintenance of motor vehicles (49 CFR Part 396.17 through 396.23 and including Appendix G, and amendments thereto) shall apply to all for-hire motor carrier vehicles, whether common carriers, contract carriers or exempt carriers and all private motor carrier vehicles engaged in intrastate commerce over the highways of the State of North Carolina if such vehicles have a GVWR of greater than 10,000 pounds. Provided, any farm vehicle shall be exempt from the requirements of this Paragraph if:

- (1) It is being operated by a farmer (or a person under the direct control of the farmer) as a private motor carrier of property;
- (2) It is being used to transport either:
 - (A) agricultural products, or
 - (B) farm machinery, farm supplies, or both, to and from a farm;
- (3) It is being operated solely within this State and within 150 air-miles of the farmer's farm;
- (4) It is not being used in the operation of a for-hire motor carrier; and

(5) It is not carrying hazardous materials of a type or quantity that requires the vehicle to be placarded in accordance with 49 CFR 177.823.

(d) Every motor vehicle registered or required to be registered in North Carolina and subject to the inspection requirements of the Federal Motor Carrier Safety Regulations (49 CFR Part 396) must display a current approved federal inspection certificate when operated on the streets and highways of this State. On self-propelled vehicles the inspection certificate shall be located on the outside of the driver's door exclusive of the window or rear view mirror. On trailers and semitrailers, the inspection certificate shall be located on the left side as near as possible to the outside lower front of the vehicle. The inspection certificate shall contain at least the following legible information:

- (1) The date of inspection;
- (2) Name and address of the motor carrier or other entity where the inspection report required by 49 CFR 396.21(a) is maintained;
- (3) Information uniquely identifying the vehicle inspected if not clearly marked on the vehicle; and
- (4) A certification that the vehicle has passed an inspection in accordance with 49 CFR 396.17.

Statutory Authority G.S. 20-37.22; 20-183.2(a); 20-384.

RRC OBJECTIONS

The Rules Review Commission (RRC) objected to the following rules in accordance with G.S. 143B-30.2(c). State agencies are required to respond to RRC as provided in G.S. 143B-30.2(d).

AGRICULTURE

Plant Industry

| | | |
|---------------------------------------|----------------------|-----------------|
| <i>2 NCAC 48E .0101 - Definitions</i> | <i>RRC Objection</i> | <i>10/17/91</i> |
| <i>Agency Revised Rule</i> | <i>RRC Objection</i> | <i>10/17/91</i> |
| <i>Agency Responded</i> | <i>No Action</i> | <i>12/19/91</i> |
| <i>Agency Withdrew Rule</i> | | <i>02/20/92</i> |

CRIME CONTROL AND PUBLIC SAFETY

State Highway Patrol

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|---|----------------------|-----------------|
| <i>14A NCAC 9H .0304 - Notifying Registered Owner</i> | <i>RRC Objection</i> | <i>12/19/91</i> |
| <i>No Response from Agency</i> | <i>No Action</i> | <i>01/24/92</i> |
| <i>Agency Withdrew Rule</i> | | <i>02/20/92</i> |

ECONOMIC AND COMMUNITY DEVELOPMENT

Credit Union Division

| | | |
|---|----------------------|-----------------|
| <i>4 NCAC 6C .0407 - Business Loans</i> | <i>RRC Objection</i> | <i>01/24/92</i> |
| <i>Agency Revised Rule</i> | <i>Obj. Removed</i> | <i>02/20/92</i> |

ENVIRONMENT, HEALTH, AND NATURAL RESOURCES

Coastal Management

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| <i>15A NCAC 7H .0306 - General Use Standards for Ocean Hazard Areas</i> | <i>RRC Objection</i> | <i>01/24/92</i> |
| <i>Agency Responded</i> | <i>No Action</i> | <i>01/24/92</i> |
| <i>Rule Returned to Agency</i> | | <i>01/24/92</i> |
| <i>Agency Filed Rule with OAH</i> | <i>Eff.</i> | <i>03/01/92</i> |
| <i>15A NCAC 7J .0301 - Who is Entitled to a Contested Case Hearing</i> | <i>RRC Objection</i> | <i>02/20/92</i> |
| <i>Rule Returned to Agency</i> | | <i>03/19/92</i> |
| <i>Agency Filed Rule with OAH</i> | <i>Eff.</i> | <i>03/31/92</i> |
| <i>15A NCAC 7J .0301 - Who is Entitled to a Contested Case Hearing</i> | <i>RRC Objection</i> | <i>03/19/92</i> |
| <i>Rule Returned to Agency</i> | | <i>03/19/92</i> |
| <i>Agency Filed Rule with OAH</i> | <i>Eff.</i> | <i>04/01/92</i> |
| <i>15A NCAC 7J .0302 - Petition For Contested Case Hearing</i> | <i>RRC Objection</i> | <i>02/20/92</i> |
| <i>Rule Returned to Agency</i> | | <i>03/19/92</i> |
| <i>Agency Filed Rule with OAH</i> | <i>Eff.</i> | <i>03/31/92</i> |
| <i>15A NCAC 7J .0302 - Petition For Contested Case Hearing</i> | <i>RRC Objection</i> | <i>03/19/92</i> |
| <i>Rule Returned to Agency</i> | | <i>03/19/92</i> |
| <i>Agency Filed Rule with OAH</i> | <i>Eff.</i> | <i>04/01/92</i> |
| <i>15A NCAC 7J .0402 - Criteria for Grant or Denial of Permit Applications</i> | <i>RRC Objection</i> | <i>10/17/91</i> |
| <i>15A NCAC 7M .0201 - Declaration of General Policy</i> | <i>RRC Objection</i> | <i>10/17/91</i> |
| <i>Agency Responded</i> | <i>No Action</i> | <i>12/19/91</i> |
| <i>Agency Responded</i> | <i>No Action</i> | <i>01/24/92</i> |
| <i>Rule Returned to Agency</i> | | <i>01/24/92</i> |
| <i>Agency Filed Rule with OAH</i> | <i>Eff.</i> | <i>03/01/92</i> |

RRC OBJECTIONS

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|--|----------------------|-----------------|
| <i>15A NCAC 7M .0202 - Policy Statements</i> | <i>RRC Objection</i> | <i>10/17/91</i> |
| <i>Agency Responded</i> | <i>No Action</i> | <i>12/19/91</i> |
| <i>Agency Responded</i> | <i>No Action</i> | <i>01/24/92</i> |
| <i>Rule Returned to Agency</i> | | <i>01/24/92</i> |
| <i>Agency Filed Rule with OAH</i> | <i>Eff.</i> | <i>03/01/92</i> |
| <i>15A NCAC 7M .0303 - Policy Statements</i> | <i>RRC Objection</i> | <i>10/17/91</i> |
| <i>Agency Responded</i> | <i>No Action</i> | <i>12/19/91</i> |
| <i>Agency Responded</i> | <i>No Action</i> | <i>01/24/92</i> |
| <i>Rule Returned to Agency</i> | | <i>01/24/92</i> |
| <i>Agency Filed Rule with OAH</i> | <i>Eff.</i> | <i>03/01/92</i> |
| <i>15A NCAC 7M .0403 - Policy Statements</i> | <i>RRC Objection</i> | <i>10/17/91</i> |
| <i>Agency Responded</i> | <i>No Action</i> | <i>12/19/91</i> |
| <i>Agency Responded</i> | <i>No Action</i> | <i>01/24/92</i> |
| <i>Agency Revised Rule</i> | <i>Obj. Removed</i> | <i>02/20/92</i> |
| <i>15A NCAC 7M .0901 - Declaration of General Policy</i> | <i>RRC Objection</i> | <i>10/17/91</i> |
| <i>Agency Responded</i> | <i>No Action</i> | <i>12/19/91</i> |
| <i>Agency Responded</i> | <i>No Action</i> | <i>01/24/92</i> |
| <i>Rule Returned to Agency</i> | | <i>01/24/92</i> |
| <i>Agency Filed Rule with OAH</i> | <i>Eff.</i> | <i>03/01/92</i> |

Environmental Management

| | | |
|---------------------------------------|----------------------|-----------------|
| <i>15A NCAC 2E .0107 - Delegation</i> | <i>RRC Objection</i> | <i>03/19/92</i> |
| <i>Agency Revised Rule</i> | <i>Obj. Removed</i> | <i>03/19/92</i> |

Governor's Waste Management Board

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|---|----------------------|-----------------|
| <i>15A NCAC 14B .0002 - Definitions</i> | <i>RRC Objection</i> | <i>03/19/92</i> |
| <i>Agency Revised Rule</i> | <i>Obj. Removed</i> | <i>03/19/92</i> |

Sedimentation Control

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| <i>15A NCAC 4A .0005 - Definitions</i> | <i>RRC Objection</i> | <i>12/19/91</i> |
| <i>Agency Responded</i> | <i>No Action</i> | <i>01/24/92</i> |
| <i>Agency Revised Rule</i> | <i>Obj. Removed</i> | <i>02/20/92</i> |
| <i>15A NCAC 4C .0007 - Procedures: Notices</i> | <i>RRC Objection</i> | <i>12/19/91</i> |
| <i>Agency Responded</i> | <i>No Action</i> | <i>01/24/92</i> |
| | <i>Obj. Removed</i> | <i>02/20/92</i> |

HUMAN RESOURCES

Facility Services

| | | |
|--|----------------------|-----------------|
| <i>10 NCAC 3J .2905 - Personal Hygiene Items</i> | <i>RRC Objection</i> | <i>10/17/91</i> |
| <i>10 NCAC 3U .0102 - Definitions</i> | <i>RRC Objection</i> | <i>03/19/92</i> |
| <i>Agency Revised Rule</i> | <i>Obj. Removed</i> | <i>03/19/92</i> |

Individual and Family Support

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|--|----------------------|-----------------|
| <i>10 NCAC 42E .0905 - Personnel: Centers: Homes with Operator/Staff</i> | <i>RRC Objection</i> | <i>01/24/92</i> |
| <i>Agency Responded</i> | <i>No Action</i> | <i>02/20/92</i> |
| <i>Agency Revised Rule</i> | <i>Obj. Removed</i> | <i>03/19/92</i> |
| <i>10 NCAC 42E .0906 - Personnel: Day Care Homes:/Staff Person/Op</i> | <i>RRC Objection</i> | <i>01/24/92</i> |
| <i>Agency Responded</i> | <i>No Action</i> | <i>02/20/92</i> |
| <i>Agency Revised Rule</i> | <i>Obj. Removed</i> | <i>03/19/92</i> |
| <i>10 NCAC 42E .1207 - Procedure</i> | <i>RRC Objection</i> | <i>01/24/92</i> |
| <i>Agency Responded</i> | <i>No Action</i> | <i>02/20/92</i> |

RRC OBJECTIONS

| | | |
|---|-----------------------|-----------------|
| <i>Agency Revised Rule</i> | <i>Obj. Removed</i> | <i>03/19/92</i> |
| <i>10 NCAC 42Z .0604 - Staff Requirements</i> | <i>RRRC Objection</i> | <i>01/24/92</i> |
| <i>Agency Responded</i> | <i>No Action</i> | <i>02/20/92</i> |
| <i>Agency Revised Rule</i> | <i>Obj. Removed</i> | <i>03/19/92</i> |
| <i>10 NCAC 42Z .0901 - Procedure</i> | <i>RRRC Objection</i> | <i>01/24/92</i> |
| <i>Agency Responded</i> | <i>No Action</i> | <i>02/20/92</i> |
| <i>Agency Revised Rule</i> | <i>Obj. Removed</i> | <i>03/19/92</i> |

Mental Health: General

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|---|-----------------------|-----------------|
| <i>10 NCAC 14S .0102 - Communication Rights</i> | <i>ARRC Objection</i> | <i>9/19/91</i> |
| <i>Agency Responded</i> | | <i>10/17/91</i> |
| <i>10 NCAC 14S .0103 - Living Environment</i> | <i>ARRC Objection</i> | <i>9/19/91</i> |
| <i>Agency Responded</i> | | <i>10/17/91</i> |

LICENSING BOARDS AND COMMISSIONS

Certified Public Accountant Examiners

| | | |
|---------------------------------------|-----------------------|-----------------|
| <i>* 21 NCAC 8G .0313 - Firm Name</i> | <i>RRRC Objection</i> | <i>10/17/91</i> |
| <i>Agency Responded</i> | <i>No Action</i> | <i>12/19/91</i> |

RULES INVALIDATED BY JUDICIAL DECISION

This Section of the Register lists the recent decisions issued by the North Carolina Supreme Court, Court of Appeals, Superior Court (when available), and the Office of Administrative Hearings which invalidate a rule in the North Carolina Administrative Code.

25 NCAC 1B .0414 - SITUATIONS IN WHICH ATTORNEYS FEES MAY BE AWARDED

Robert Roosevelt Reilly Jr., Administrative Law Judge with the Office of Administrative Hearings, declared Rule 25 NCAC 1B .0414 void as applied in *William Paul Fearrington, Petitioner v. University of North Carolina at Chapel Hill, Respondent* (91 OSP 0905).

CONTESTED CASE DECISIONS

This Section contains the full text of some of the more significant Administrative Law Judge decisions along with an index to all recent contested cases decisions which are filed under North Carolina's Administrative Procedure Act. Copies of the decisions listed in the index and not published are available upon request for a minimal charge by contacting the Office of Administrative Hearings, (919) 733-2698.

KEY TO CASE CODES

| | | | |
|-----|--|-----|---|
| ABC | Alcoholic Beverage Control Commission | EDC | Department of Public Instruction |
| BDA | Board of Dental Examiners | EHR | Department of Environment, Health, and Natural Resources |
| BME | Board of Medical Examiners | ESC | Employment Security Commission |
| BMS | Board of Mortuary Science | HAF | Hearing Aid Dealers and Fitters Board |
| BOG | Board of Geologists | HRC | Human Relations Commission |
| BON | Board of Nursing | IND | Independent Agencies |
| BOO | Board of Opticians | INS | Department of Insurance |
| CFA | Commission for Auctioneers | LBC | Licensing Board for Contractors |
| COM | Department of Economic and Community Development | MLK | Milk Commission |
| CPS | Department of Crime Control and Public Safety | NHA | Board of Nursing Home Administrators |
| CSE | Child Support Enforcement | OAH | Office of Administrative Hearings |
| DAG | Department of Agriculture | OSP | Department of State Personnel |
| DCC | Department of Community Colleges | PHC | Board of Plumbing and Heating Contractors |
| DCR | Department of Cultural Resources | POD | Board of Podiatry Examiners |
| DCS | Distribution Child Support | SOS | Department of Secretary of State |
| DHR | Department of Human Resources | SPA | Board of Examiners of Speech and Language Pathologists and Audiologists |
| DOA | Department of Administration | | |
| DOJ | Department of Justice | | |
| DOL | Department of Labor | | |
| DSA | Department of State Auditor | | |
| DST | Department of State Treasurer | WRC | Wildlife Resources Commission |

| CASE NAME | CASE NUMBER | ALJ | FILED DATE |
|---|----------------------------|--------|------------|
| Alyce W. Pringle v. Department of Education | 88 OSP 0592 88 EEO 0992 | Morgan | 03/27/92 |
| Susie Woodle v. Department of Commerce, State Ports Authority | 88 OSP 1411 | Mann | 03/25/92 |
| Fernando Demeco White v. DHR, Caswell Center | 89 OSP 0284 | West | 01/10/92 |
| Cathy Faye Barrow v. DHR, Craven County Health Department | 89 DHR 0715 | Morgan | 03/09/92 |
| Kenneth W. White v. Employment Security Commission | 90 OSP 0390 | Becton | 01/13/92 |

CONTESTED CASE DECISIONS

| CASE NAME | CASE NUMBER | ALJ | FILED DATE |
|---|-------------|----------|------------|
| Craig S. Eury v. Employment Security Commission | 90 OSP 0391 | Becton | 01/13/92 |
| Jolene H. Johnson v. DHR, Division of Medical Assistance | 90 DHR 0685 | Morgan | 02/21/92 |
| Sgt. Carl Edmunds v. DHR, Division of Social Services, CSE | 90 CSE 1135 | Nesnow | 02/04/92 |
| Rafael Figueroa v. DHR, Division of Social Services, CSE | 90 CSE 1138 | Morgan | 03/30/92 |
| Sammie L. Frazier v. DHR, Division of Social Services, CSE | 90 CSE 1167 | Morgan | 03/24/92 |
| Richard A. Boyett v. DHR, Division of Social Services, CSE | 90 CSE 1184 | Morgan | 03/30/92 |
| Lance McQueen v. DHR, Division of Social Services, CSE | 90 CSE 1204 | Morgan | 03/30/92 |
| Kermit Linney v. Department of Correction | 90 OSP 1380 | Morrison | 02/12/92 |
| Jerry Odell Johnson v. Sheriffs' Education & Training Standards Comm | 90 DOJ 1411 | Morgan | 01/09/92 |
| Stoney W. & Darlene L. Thompson v. Department of Environment, Health, & Natural Resources | 91 EHR 0003 | West | 01/06/92 |
| Gloria Jones/Medbill v. Children Special Health Services | 91 EHR 0142 | Morgan | 03/11/92 |
| Thomas Such v. EIIR and William W. Cobey Jr. | 91 OSP 0202 | Becton | 02/20/92 |
| N.C. Human Relations Comm. on behalf of Deborah Allen v. Charles Watkins | 91 HRC 0204 | Morrison | 03/17/92 |
| Cindy Gale Hyatt v. Department of Human Resources | 91 DHR 0215 | Morgan | 02/27/92 |
| Gliston L. Morrisey v. Bd of Trustees/Teachers' & St Emp Retirement Sys | 91 DST 0232 | West | 02/03/92 |
| Anthony Caldwell v. Juvenile Evaluation Center | 91 OSP 0259 | Morgan | 03/12/92 |

CONTESTED CASE DECISIONS

| CASE NAME | CASE NUMBER | ALJ | FILED DATE |
|---|-------------|----------|------------|
| Kenneth R. Downs, Guardian of Mattie M. Greene v. Teachers' & St Emp Comp Major Medical Plan | 91 DST 0261 | Gray | 02/20/92 |
| Deborah W. Clark v. DHR, Dorothea Dix Hospital | 91 OSP 0297 | Nesnow | 01/16/92 |
| Wade R. Bolton v. DHR, Division of Social Services, CSE | 91 CSE 0312 | Mann | 01/14/92 |
| Betty L. Rader v. Teachers' & St Emp Major Medical Plan | 91 DST 0330 | Morgan | 01/10/92 |
| Marcia Carpenter v. UNC - Charlotte | 91 OSP 0346 | Mann | 03/12/92 |
| James Arthur Lee v. NC Crime Victims Compensation Commission | 91 CPS 0355 | Chess | 03/05/92 |
| Michael Darwin White v. Department of Environment, Health, & Natural Resources | 91 OSP 0413 | Morrison | 02/14/92 |
| Curtis Wendell Bigelow v. CCPS, Division of State Highway Patrol | 91 OSP 0418 | West | 03/10/92 |
| Alcoholic Beverage Control Commission v. Hilsinger Enterprises, Inc., t/a The Waterin Hole | 91 ABC 0442 | Gray | 01/10/92 |
| Penny Whitfield v. Pitt County Mental Health Center | 91 OSP 0465 | Gray | 01/08/92 |
| Senior Citizens' Home Inc. v. DHR, Division of Facility Services, Licensure Section | 91 DHR 0467 | Gray | 02/18/92 |
| Alcoholic Beverage Control Commission v. Everett Lee Williams Jr., t/a Poor Boys Gameroom | 91 ABC 0531 | Morrison | 01/31/92 |
| Jonathan Russell McCravey, t a Encore v. Alcoholic Beverage Control Commission | 91 ABC 0534 | Morrison | 02/04/92 |
| Horace Britton Askew Jr. v. Sheriffs' Education & Training Standards Comm | 91 DOJ 0610 | Reilly | 01/22/92 |
| Roy L. Keever v. Department of Correction | 91 OSP 0615 | West | 02/26/92 |

CONTESTED CASE DECISIONS

| CASE NAME | CASE NUMBER | ALJ | FILED DATE |
|---|----------------------------|----------|------------|
| Larry Madison Chatman, t/a Larry's Convenient Store v. Alcoholic Beverage Control Commission | 91 ABC 0626 | Gray | 02/20/92 |
| Cecil Leon Neal v. Department of Economic & Community Development | 91 OSP 0648 | Mann | 02/07/92 |
| DAG, Food & Drug Protection Div, Pesticide Section v. D. Carroll Vann | 91 DAG 0654 | Morrison | 01/15/92 |
| Kidd's Day Care and Preschool v. Child Day Care Section | 91 DHR 0666 | Becton | 03/25/92 |
| Mary Tisdale v. Hyde County Health Department and EHR | 91 EHR 0679 | Morgan | 03/23/92 |
| Alcoholic Beverage Control Commission v. Kenneth Richard Cooper, t/a Silvers | 91 ABC 0680 | Becton | 02/26/92 |
| Sarah Linda Hankins v. Alcoholic Beverage Control Commission | 91 ABC 0688 | Mann | 02/27/92 |
| Keith Hull v. DHR - Division of Medical Assistance | 91 DHR 0707 | Chess | 02/27/92 |
| John E. Canup v. DHR, Division of Social Services, CSE | 91 CSE 0759 | Reilly | 01/13/92 |
| Falcon Associates, Inc. v. Department of Environment, Health, & Natural Resources | 91 EHR 0767 91 EHR 0768 | West | 01/06/92 |
| Michael F. Stone v. Bd of Trustees/Local Gov't Emp Retirement Sys | 91 DST 0771 | West | 02/24/92 |
| Ruben Gene McLean v. Alcoholic Beverage Control Commission | 91 ABC 0772 | Nesnow | 01/30/92 |
| Bobby McEachern v. Fayetteville State University | 91 OSP 0839 | Gray | 02/06/92 |
| Singletree, Inn v. EHR, and Stokes County Health Department | 91 EHR 0840 | Nesnow | 01/16/92 |
| Henry B. Barnhardt v. Mt Pleasant Vol Fire Dept, St Auditor/Firemen's Rescue Squad Workers' Pension Fund | 91 DSA 0843 | Reilly | 01/29/92 |

CONTESTED CASE DECISIONS

| CASE NAME | CASE NUMBER | ALJ | FILED DATE |
|--|--------------|----------|------------|
| Mackey L. Hall v. DIIR, Division of Social Services, CSE | 91 CSE 0854 | Reilly | 01/17/92 |
| Kay Long v. Department of Human Resources | 91 DHR 0873 | Reilly | 03/17/92 |
| Alcoholic Beverage Control Commission v. Mack Ray Chapman, t/a Ponderosa Lounge | 91 ABC 0887 | Morrison | 01/31/92 |
| Joseph W. Devlin Jr., Johnson Brothers Carolina Dist v. Alcoholic Beverage Control Commission | 91 ABC 0890 | West | 02/11/92 |
| Ossie Beard v. EHR & Wastewater Treatment Plant Certification Comm. | 91 EHR 0893 | Nesnow | 03/12/92 |
| Alcoholic Beverage Control Commission v. Trinity C. C., Inc., t/a Trinity College Cafe | 91 ABC 0915 | West | 02/11/92 |
| N.C. Alcoholic Beverage Control Commission v. Jessie Pendergraft Rigsbee, T/A Club 2000 | 91 ABC 0919 | West | 03/12/92 |
| Alcoholic Beverage Control Commission v. Cedric Warren Edwards, t/a Great, American Food Store | 91 ABC 0923 | Becton | 02/26/92 |
| Department of Environment, Health, & Natural Resources v. Hull's Sandwich Shop, Andy Hull | 91 EHR 0936 | West | 01/09/92 |
| Betty Davis d b/a ABC Academy v. DIIR, Division of Facility Services, Child Day Care Section | 91 DIIR 0955 | Morrison | 01/31/92 |
| Thomas J. Hailey v. EHR and Rockingham County Health Department | 91 EHR 0957 | Becton | 01/15/92 |
| Ronald Waverly Jackson v. EHR, Division of Maternal & Child Health, WIC Section | 91 EHR 0963 | Gray | 02/24/92 |
| Century Care of Laurinburg, Inc. v. DIIR, Division of Facility Services, Licensure Section | 91 DHR 0981 | Gray | 03/24/92 |
| Roy Shealey v. Victims Compensation Commission | 91 CPS 1002 | Morrison | 01/31/92 |
| Willie Brad Baldwin v. DIIR, Division of Social Services, CSE | 91 CSE 1020 | Reilly | 01/28/92 |
| Clinton Dawson v. N.C. Department of Transportation | 91 OSP 1021 | Mann | 03/05/92 |

CONTESTED CASE DECISIONS

| CASE NAME | CASE NUMBER | ALJ | FILED DATE |
|--|-------------|----------|------------|
| Benjamin C. Dawson v. Department of Correction | 91 OSP 1025 | West | 02/18/92 |
| Paulette R. Smith v. DHR, Division of Social Services, CSE | 91 CSE 1026 | Reilly | 02/27/92 |
| Scot Dawson v. Department of Labor | 91 DOL 1031 | West | 02/24/92 |
| Luis A. Rosario v. DHR, Division of Social Services, CSE | 91 CSE 1046 | Morrison | 03/03/92 |
| Randy Quinton King v. CCPS, State Highway Patrol | 91 OSP 1064 | Gray | 03/24/92 |
| William H. Hogsed v. DHR, Division of Social Services, CSE | 91 CSE 1070 | Nesnow | 03/16/92 |
| David L. Brown v. DHR, Division of Social Services, CSE | 91 CSE 1074 | Morrison | 03/31/92 |
| Donald M. Washington v. DHR, Division of Social Services, CSE | 91 CSE 1078 | Morrison | 03/04/92 |
| Melvin L. Miller Sr. v. DHR, Division of Social Services, CSE | 91 CSE 1084 | Morrison | 03/16/92 |
| Bobby G. Evans v. DHR, Division of Social Services, CSE | 91 CSE 1094 | Reilly | 01/13/92 |
| William Louis Timmons v. DHR, Division of Social Services, CSE | 91 CSE 1104 | Mann | 02/18/92 |
| Raymond Junior Cagle v. DHR, Division of Social Services, CSE | 91 CSE 1123 | Mann | 03/30/92 |
| Richard E. Murray v. Department of Human Resources | 91 CSE 1134 | Reilly | 01/13/92 |
| Pathia Miller v. DHR, Division of Facility Services, Child Day Care Section | 91 DHR 1135 | Mann | 03/31/92 |
| Atlantic Enterprises, Inc. v. Department of Environment, Health, & Natural Resources | 91 EHR 1136 | Reilly | 01/23/92 |
| Theresa M. Sparrow v. Criminal Justice Education & Training Standards Comm | 91 DOJ 1138 | Mann | 02/04/92 |

CONTESTED CASE DECISIONS

| CASE NAME | CASE NUMBER | ALJ | FILED DATE |
|---|-------------|----------|------------|
| Darrel D. Shields v. DHR, Division of Social Services, CSE | 91 CSE 1141 | Morgan | 03/30/92 |
| James A. Hinson v. DHR, Division of Social Services, CSE | 91 CSE 1154 | Mann | 02/18/92 |
| George H. Parks Jr. v. DHR, Division of Social Services, CSE | 91 CSE 1157 | Morrison | 01/27/92 |
| Adrian Chandler Harley v. DHR, Division of Social Services, CSE | 91 CSE 1180 | Nesnow | 02/10/92 |
| Billy J. Hall v. DHR, Division of Social Services, CSE | 91 CSE 1182 | Nesnow | 02/10/92 |
| Donaldson L. Wooten v. DHR, Division of Social Services, CSE | 91 CSE 1189 | Reilly | 03/13/92 |
| William P. Reid v. DHR, Division of Social Services, CSE | 91 CSE 1193 | Nesnow | 02/04/92 |
| Ronald G. Bolden v. DHR, Division of Social Services, CSE | 91 CSE 1208 | Gray | 02/26/92 |
| Wayne Phillip Irby v. DHR, Division of Social Services, CSE | 91 CSE 1211 | Nesnow | 02/04/92 |
| Tony Hollingsworth v. DHR, Division of Social Services, CSE | 91 CSE 1212 | Nesnow | 02/10/92 |
| Russell G. Ginn v. Department of Correction | 91 OSP 1224 | Reilly | 02/14/92 |
| Angela McDonald McDougald v. DHR, Division of Social Services, CSE | 91 CSE 1227 | Nesnow | 02/28/92 |
| Sering O. Mbye v. DHR, Division of Social Services, CSE | 91 CSE 1228 | Mann | 03/11/92 |
| Arthur Thomas McDonald Jr. v. DHR, Division of Social Services, CSE | 91 CSE 1252 | Morrison | 03/31/92 |
| Stanford Earl Kern v. DHR, Division of Social Services, CSE | 91 CSE 1255 | Nesnow | 02/04/92 |
| Gene Weaver v. DHR, Division of Social Services, CSE | 91 CSE 1264 | Reilly | 03/25/92 |

CONTESTED CASE DECISIONS

| CASE NAME | CASE NUMBER | ALJ | FILED DATE |
|--|----------------------------|----------|------------|
| James T. White v. DHR, Division of Social Services, CSE | 91 CSE 1271 | Gray | 02/27/92 |
| Ronald Brown and Regina Brown v. DHR, Division of Facility Services | 91 DHR 1278 | Becton | 02/25/92 |
| Samuel Armwood v. David Brantley, Wayne County Clerk of Superior Court | 91 CSE 1285 | Reilly | 02/11/92 |
| Raymond Vaughan v. DHR, Division of Social Services, CSE | 91 CSE 1304 | Reilly | 03/09/92 |
| Stanley Wayne Gibbs v. Elizabeth City State University | 91 OSP 1318 | Gray | 01/14/92 |
| David Martin Strode v. DHR, Division of Social Services, CSE | 91 CSE 1327 | Morgan | 03/19/92 |
| Steveason M. Bailey v. McDowell Technical Community College | 91 OSP 1353 | Morrison | 01/28/92 |
| Gary N. Rhoda v. Department of Correction | 91 OSP 1361 | Nesnow | 01/31/92 |
| William A. Sellers v. DHR, Division of Social Services, CSE | 91 CSE 1395 | Gray | 04/01/92 |
| Marc D. Walker v. CCPS, Division of State Highway Patrol | 91 OSP 1399 | Morrison | 03/16/92 |
| Serena Gaynor v. DHR, Division of Vocational Rehabilitation | 91 OSP 1403 | Gray | 03/02/92 |
| Betty Davis, D/B/A ABC Academy v. DHR, Division of Facility Services, Child Day Care Section | 91 DHR 1408 | Chess | 03/30/92 |
| Charles R. Wellons II v. Department of Environment, Health, & Natural Resources | 91 EHR 1418 | West | 02/25/92 |
| Charley Joe Milligan v. Bd of Trustees/Local Gov't Emp Retirement Sys | 91 DST 1424 | Gray | 02/27/92 |
| Roy Blalock, Deborah Eakins, John Gordon Wright v. UNC - Chapel Hill | 91 OSP 1429 91 OSP 1430 | Gray | 03/13/92 |

CONTESTED CASE DECISIONS

| CASE NAME | CASE NUMBER | ALJ | FILED DATE |
|--|--------------|--------|------------|
| New Bern-Craven County Board of Education, a Statutory Corporation of North Carolina v. The Honorable Harlan E. Boyles, State Treasurer, The Honorable Fred W. Talton, State Controller, The Honorable William W. Cobey, Jr., Secy. of EHR, Dr. George T. Everett, Dir., Div. of Environmental Mgmt. | 92 EHR 0003 | Reilly | 03/13/92 |
| Private Protective Services Board v. Robert R. Missildine, Jr. | 92 DOJ 0025 | Becton | 03/23/92 |
| Cindy G. Bartlett v. Department of Correction | 92 OSP 0029 | Reilly | 03/16/92 |
| Kurt Hafner v. N.C. Retirement System et al. | 92 DST 0094 | Gray | 03/04/92 |
| Roy Blalock, Deborah Eakins, John Gordon Wright v. UNC - Chapel Hill | 92 OSP 0096 | Gray | 03/13/92 |
| Youth Focus, Inc. (MID # 239-23-0865T) v. DHR, Division of Medical Assistance | 92 DIHR 0110 | Gray | 02/26/92 |

CONTESTED CASE DECISIONS

STATE OF NORTH CAROLINA
COUNTY OF CUMBERLAND

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
91 DHR 0666

KIDD'S DAY CARE AND PRESCHOOL,)
Petitioner)
v.)
CHILD DAY CARE SECTION,)
Respondent)

RECOMMENDED DECISION

This matter is before the undersigned administrative law judge on motion by the Respondent for an order granting summary judgment in its favor.

APPEARANCES

Petitioner: Pro se.

Respondent: Jennie Jarrell Hayman, Assistant Attorney
General, Department of Justice, Raleigh,
North Carolina

ISSUE

Whether the Child Day Care Section of the Department of Human Resources erred when it issued a written reprimand to the Petitioner for allegedly leaving children unattended in the day care center's van.

SUMMARY OF UNDISPUTED FACTS

Kidd's Day Care and Preschool, the Petitioner in the matter, is a child day center operated by Ms. Marian Kidd and located in Fayetteville, North Carolina. The Petitioner is licensed by the Respondent, Child Day Care Section, Division of Facility Services, Department of Human Resources, to operate a child day care center.

On April 29, 1991, the Respondent received a report alleging child neglect at Kidd's Day Care and Preschool. The report alleged that day care children were left unattended on the Petitioner's van with the engine running while the driver left the van.

Glenda Holmes, the van driver, recalls one incident when she drove the van to the front of the day care center building to pick up a child at the front door of the center. Ms. Holmes got out of the van in order to assist the child in boarding the van. She left the engine running and other school age children inside the van while she walked around the front of the van and took approximately nine steps away from the van so that she could assist the child leaving the building board the van. After helping the child through the van's side door and securing the child's seat belt, Ms. Holmes walked around the front of the van and returned to the driver's seat. Ms. Holmes was able to maintain visual contact with the van and the children on board the van at all times during the boarding process.

On May 31, 1991, a written reprimand was issued to the Petitioner due to an alleged violation of 10 NCAC 3U .1003(h) which provides that "Children shall never be left in a vehicle unattended by an adult."

CONCLUSIONS OF LAW

1. At issue in this contested case is the meaning of the term "unattended." The term "unattended" is not defined in the Administrative Code. The Respondent contends that "unattended" means that an adult must be inside the vehicle with the children at all times. The Petitioner, on the other hand, contends that "unattended" means lack of visual contact with the children being supervised.
2. One of the principles of statutory or regulatory construction is that words should be given their plain and ordinary meaning. Webster's Third New International Dictionary, 1961, defines "unattended" as follows:
 - (1) Not attended;
 - a. lacking a guard, escort, caretaker or other watcher.
 - b. lacking people in attendance.
 - (2) Unaccompanied;
 - (3) a. not cared for; untended.
 - b. not watched with care, attentiveness or accuracy.

The focus of the definitions found in Webster's appears to be on proximity and attentiveness (visual contact coupled with the ability to react appropriately to what one observes).

4. In Pinyon v. Settle, 263 N.C. 578, 139 S.E.2d 863 (1965), the court held that leaving a motor vehicle "unattended" means leaving it without any one present who is competent to prevent any of the probable dangers to the public. Pinyon, however, only addresses the question of when a vehicle is unattended. The Court did not consider the issue of whether the child in the vehicle was unattended. By way of analogy, one might argue that leaving a child without any one present who is competent to prevent any of the probable dangers that might occur to the child constitutes leaving the child unattended. This definition is similar to the focus on proximity and attentiveness found in the definitions for unattended in Webster's.
5. Applying the definitions of unattended found in Webster's to the facts in this case, one can conclude that since Ms. Holmes was in close proximity to both the children and the vehicle, the children in the van were not without a caretaker or other watcher; they were not unaccompanied; and they were not without someone to care for them. The fact that the person supervising them did not remain inside the van with them at all times does not necessarily mean that the children were not watched with care, attentiveness or accuracy. There are no facts indicating that the children were not closely watched.
6. The children were not unattended merely because the adult responsible for supervising them was not physically inside the vehicle with them. Ordinarily, an adult outside a vehicle should be able to respond to what ever circumstances develop as long as the person is attentive and within a reasonable distance of the vehicle.
7. A reasonable interpretation of "unattended" in the regulation involved in this case is that an adult must be in close enough proximity to the children to maintain visual contact and to react to whatever probable needs or emergencies that might arise.
8. The van driver was able to maintain visual contact with the children in the van, and nine steps away from the van is not so unreasonable a distance that one would not expect the driver to be able to react to whatever probable needs or emergencies that could occur.

CONTESTED CASE DECISIONS

9. The fact that it might not have been wise or prudent of the driver to leave the keys in the ignition and the van running while she was assisting a child to board is a separate issue from that of whether the children were unattended.
10. If it was the intent of the regulation in question to require that an adult remain inside the vehicle rather than to attentively supervise the children, then the regulation could have and should have specifically said that when children are in a vehicle, an adult must remain inside the vehicle with the children. The term "unattended" does not mean that one can never leave the vehicle while there are children in it.
11. The respondent erred when it issued the May 31, 1991 written reprimand to the Petitioner.
12. The Respondent is not entitled to summary judgment in its favor.
13. The Petitioner is entitled to summary judgment in its favor.

RECOMMENDED DECISION

The Department of Human Resources will make the Final Decision in this contested case. It is recommended that the agency adopt the Findings of Fact and Conclusions of Law set forth above and enter summary judgment in favor of the Petitioner and rescind the May 31, 1991 written reprimand directed to the Petitioner.

ORDER

It is hereby ordered that the agency serve a copy of the Final Decision on the Office of Administrative Hearings, P.O. Drawer 27447, Raleigh, N.C. 27611-7447, in accordance with North Carolina General Statutes section 150B-36(b).

NOTICE

Before the agency makes the FINAL DECISION, it is required by North Carolina General Statutes section 150B-36(a) to give each party an opportunity to file exceptions to this RECOMMENDED DECISION, and to present written arguments to those in the agency who will make the final decision.

The agency is required by North Carolina General Statutes section 150B-36(b) to serve a copy of the Final Decision on all parties and to furnish a copy to the Parties' attorney of record.

This the 25th day of March, 1992.

Brenda B. Becton
Administrative Law Judge

CONTESTED CASE DECISIONS

STATE OF NORTH CAROLINA
COUNTY OF SCOTLAND

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
91 DHR 0981

CENTURY CARE OF LAURINBURG, INC.,)
Petitioner)
v.)
NORTH CAROLINA DEPARTMENT OF)
HUMAN RESOURCES, DIVISION OF)
FACILITY SERVICES, LICENSURE SECTION,)
Respondent)

RECOMMENDED DECISION

This contested case came on for hearing before the undersigned on March 17, 1992, on the Motion of Petitioner Century Care of Laurinburg, Inc. ("Century Care"), for a recommended decision in the nature of summary disposition. Appearing on behalf of the Petitioner were Robert V. Bode, S. Todd Hemphill, and Diana E. Ricketts, of the law firm of Bode Call & Green. Appearing on behalf of the Respondent North Carolina Department of Human Resources, Division of Facility Services, Licensure Section (the "Agency") was Amy A. Barnes, Associate Attorney General, North Carolina Department of Justice.

At issue in Petitioner's Motion is the composition of the Agency's Penalty Review Committee, which recommended the assessment of the penalty which is the subject of this contested case. Petitioner contends that the Penalty Review Committee was not properly constituted because, contrary to the requirements of G.S. § 143B-10(d), the majority of the members of the Committee reside in the same congressional district.

ISSUE

Whether there is any genuine issue as to any material fact and whether any party is entitled to summary disposition as a matter of law.

BURDEN OF PROOF

The moving party has the burden of establishing that there is no genuine issue as to any material fact and that it is entitled to summary disposition as a matter of law.

UNDISPUTED FACTS

Based on the uncontested evidence appearing of record, to which consideration may be given under G.S. § 150B-33(3a), 26 NCAC 3.0001, 3.0005(6), and Rule 56, N.C.R.Civ.P., including the pleadings, affidavits and discovery submitted, and having considered the legal memoranda submitted by the parties and the oral argument of March 17, 1992, the undersigned has concluded that there is no genuine issue as to any material fact and makes the following finds of undisputed, material fact:

1. The Penalty Review Committee established by the Agency recommended that the penalty which is the subject of this contested case hearing be assessed against Petitioner.
2. The penalty was assessed by letter dated September 24, 1991, from Lynda D. McDaniel, Chief of the Licensure Section, to Noah Duncan, Administrator, Century Care of Laurinburg.
3. Petitioner timely appealed the assessment of that penalty to the Office of Administrative Hearings.
4. G.S. § 143B-10(d) provides as follows:

(d) Appointment of Committees or Councils. - The head of each principal department may create and appoint committees or councils to consult with and advise the department. The General Assembly declares its policy that insofar as feasible, such committees or councils shall consist of no more than 11 members, with not more than one from each congressional district. If any department head desires to vary this policy, he must make a request in writing to the Governor, stating the reasons for the request. The Governor may approve the request, but may only do so in writing. Copies of the request and approval shall be transmitted to the Advisory Budget Commission and the Joint Legislative Commission on governmental Operations. The members of any committee or council created by the head of a principal department shall serve at the pleasure of the head of the principal department and may be paid per diem and necessary travel and subsistence expenses with the provisions of G.S. 138-5, when approved in advance by the Director of the Budget. Per diem, travel, and subsistence payments to members of the committees or councils created in connection with federal programs shall be paid from federal funds unless otherwise provided by law.

An annual report listing these committees or councils, the total membership on each, the cost in the last 12 months and the source of funding, and the title of the person who made the appointments shall be made to the Advisory Budget Commission and the Joint Legislative Commission on Governmental Operations by March 31, of each year.

Prior to taking any action under this subsection, the Director of the Budget may consult with the Advisory Budget Commission.

5. G.S. § 131D-34(h) provides as follows:

(h) The Secretary shall establish a penalty review committee within the Department, which shall review administrative penalties assessed pursuant to this section and pursuant to G.S. 131E-129. The Secretary shall ensure that departmental staff review of local departments of social services' penalty recommendations along with prepared staff recommendations for the penalty review committee are completed within 60 days of receipt of the Department of the local recommendations. The Penalty Review Committee shall not review penalty recommendations agreed to by the Department and the long-term care facility for Type B violations except those violations that have been previously cited against the long-term care facility during the previous 12 months or within the time period of the previous licensure inspection, whichever time period is longer. The Secretary shall ensure that the Nursing Home/Rest Home Penalty Review Committee established by this subsection is comprised of nine members. At least one member shall be appointed from each of the following categories:

- (1) A licensed pharmacist;
- (2) A registered nurse experienced in long-term care;
- (3) A representative of a nursing home;
- (4) A representative of a domiciliary home; and
- (5) A public member.

Neither the pharmacist, nurse, nor public member appointed under this subsection nor any member of their immediate families shall be employed by or own interest in a nursing home or domiciliary home.

Each member of the Committee shall serve a term of two years. The initial terms of the members shall commence on August 3, 1989. The Secretary shall fill all vacancies. Unexcused absences from three consecutive meetings constitute resignation from the Committee.

6. G.S. § 131E-129(g) provides as follows:

(g) The penalty review committee established pursuant to G.S. 131D-34(h) shall review administrative penalties assessed pursuant to this section, provided, however, that the Penalty Review Committee shall not review penalty recommendations agreed to by the Department and the long-term care facility for Type B violations except those violations that have been previously cited against the long-term care facility during the previous 12 months, or within the time period of the previous licensure inspection whichever time period is longer.

7. The Penalty Review Committee which recommended the penalty against Petitioner was comprised of nine members, more than one of whom were residents of the 4th congressional District.

8. The Agency has never requested in writing to the Governor approval for the membership of the Penalty Review Committee to be comprised of more than one member from any congressional district.

9. The Governor has never approved, in writing, a request by the Department to include more than one member from one congressional district on the Penalty Review Committee.

10. The Agency established the Penalty Review Committee by DHR Directive Number 40, which was issued by the Secretary of the Department of Human Resources, and which has been made a part of this administrative record.

11. DHR Directive Number 40 cites G.S. §§ 143B-10, 131D-34 and 131E-129 in the beginning of the Directive as authority.

12. DHR Directive Number 40 specifically cites G.S. § 143B-10(d) as authority for the payment of per diem and necessary travel and other expenses for members of the Penalty Review Committee.

13. The Agency listed the Penalty Review Committee as one of the committees of the Division of Facility Services in its 1990 and 1991 reports to the Advisory Budget Commission.

Based upon the foregoing facts, the undersigned makes the following:

CONCLUSIONS OF LAW

1. There is no genuine issue of material fact and, based upon the statutes quoted above, G.S. §§ 143B-10(d), 131D-34(h), and 131E-129(g), the Petitioner, Century Care of Louisburg, Inc. is entitled to summary disposition as a matter of law.

2. The Agency was required to comply with G.S. § 143B-10(d) in establishing the Penalty Review Committee.

3. The Agency failed to comply with G.S. § 143B-10(d) because more than one member of the Penalty Review Committee was from the 4th Congressional District, and because the Agency never requested or received from the Governor approval for a variance from this requirement.

4. In ordering payment of a penalty based upon the recommendation of an improperly constituted Penalty Review Committee, the Agency exceeded its authority, acted erroneously, failed to use proper procedure, and failed to act as required by law. G.S. § 150B-23(a)(1), (2), (3) and (5).

DISCUSSION

The Agency argues that G.S. § 143B-10(d) has no application to the Penalty Review Committee, because there is separate statutory authority for the creation of the Penalty Review Committee in G.S.

§ 131D-34(h) which specifically established and sets guidelines for the membership of the Committee. The Agency further argues that, as G.S. § 131D-34(h) was enacted later in time than G.S. § 143B-10(d), to the extent there are any conflicts between the statutes, the later-enacted and more specific statute regarding the Penalty Review Committee should take precedence. The undersigned disagrees with these arguments for two reasons.

First, the Secretary of the Department of Human Resources has cited as authority in the beginning of DHR Directive Number 40, which was made a part of this administrative record by both parties, G.S. §§ 131D-34, 131E-129, and 143B-10(d). Additionally, the Secretary cites G.S. § 143B-10(d) in the Directive as authority for payment to members of the Committee of per diem and travel expenses. Additionally, the Agency has admitted that it submitted information to the Advisory Budget Commission of the State Budget Office regarding the Penalty Review Committee. The statutory authority requiring such admission is G.S. § 143B-10(b), and the Agency has cited no other statutory authority requiring its submission of this information to the Advisory Budget Commission. Thus, the Agency clearly has relied upon G.S. § 143B-10(d) in creation and administration of the Penalty Review Committee and contemplated that G.S. § 143B-10(d) applies at least in some respects to the Penalty Review Committee. However, the Agency does not have the authority to take advantage of some of the provisions of the statute while ignoring others.

Second, upon review the three statutes quoted hereinabove, the undersigned finds no conflict between their provisions, and holds that the Agency must comply with all of them in forming the Penalty Review Committee and in assessing penalties. The proper construction of different statutory provisions dealing with the same subject is to harmonize those statutes if possible. The three statutes simply do not conflict with each other, because the requirements of each can be achieved without doing violence to the requirements of the others.

Specifically, G.S. § 143B-10(d) requires that department committees be comprised of no more than 11 members, with no two members residing in the same congressional district. G.S. § 131D-34(h) requires that the Penalty Review Committee be comprised of 9 members, five of whom must be appointed from certain specific categories. Notably, these latter five statutorily required members of the Penalty Review Committee were each from different congressional districts. The Agency has not claimed or made any showing that it could not have similarly appointed the remaining four members from different congressional districts.

Moreover, if the Agency wished to depart from the provisions of G.S. § 143B-10(d) regarding the residences of the Penalty Review Committee members, the statute provides a ready remedy. The Secretary may apply in writing to the Governor to vary this policy, and the Governor may approve such variance in writing. However, the Agency has admitted that it has never even considered this alternative.

Based on the foregoing, the undersigned concludes that the Penalty Review Committee was improperly comprised because it consisted of more than one member from one congressional district contrary to the requirements under G.S. § 143B-10(d).

The next question which must be answered is what effect this conclusion has upon the penalty which was assessed upon Century Care by the Agency. G.S. §§ 131D-34(h) and 131E-129(g) answer this question. Both statutes are mandatory, in requiring that the Penalty Review Committee be established to review administrative penalties assessed by the Agency. If a properly constituted Penalty Review Committee has not reviewed the penalties prior to their assessment against the facility, then the Agency has not followed proper procedure in assessing the penalty. There can be no valid penalty unless the procedure has been followed.

DECISION

Therefore, the undersigned recommends that Petitioner's Motion for Summary Disposition be granted, on the grounds that the Penalty Review Committee which recommended the penalty was improperly constituted in contravention of the statutory requirement, and that the assessment of the

penalty was therefore made in excess of statutory authority, upon improper procedure, erroneously and contrary to law.

Accordingly, Petitioner's Motion for a Recommended Decision in the Nature of Summary Disposition is granted and it is recommended that the penalty assessed against Petitioner be vacated.

NOTICE

The Agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this recommended decision and to present written arguments to those in the agency who will make the final decision. N.C. Gen. Stat. § 150B-36(a).

The Secretary of the North Carolina Department of Human Resources or his designee will make the final decision in this contested case.

This the 24th day of March, 1992.

Beecher R. Gray
Administrative Law Judge

CONTESTED CASE DECISIONS

**STATE OF NORTH CAROLINA
COUNTY OF DUPLIN**

**IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
91 OSP 1064**

RANDY QUINTON KING,)
Petitioner)
v.)
NORTH CAROLINA DEPARTMENT OF)
CRIME CONTROL AND PUBLIC SAFETY,)
STATE HIGHWAY PATROL,)
Respondent)

RECOMMENDED DECISION

This matter was heard before Beecher R. Gray, administrative law judge, on February 11-14, 1992 in Raleigh, North Carolina. At the close of the evidence, the parties made oral closing arguments and elected not to order transcripts or to file written proposals and arguments.

APPEARANCES

Petitioner: John P. Edwards, Jr., Esq.

Respondent: Joseph P. Dugdale, Esq.

ISSUE

Whether Respondent had just cause to terminate Petitioner's employment on August 5, 1991 for reasons of improper personal conduct.

FINDINGS OF FACT

1. The parties received notices of hearing by certified mail more than 15 days prior to the hearing and so stipulated on the record.
2. The parties further stipulated on the record that Petitioner was a permanent state employee under Chapter 126 of the General Statutes of North Carolina at the time of his dismissal.
3. Petitioner was married to Tamela Marion King in June, 1986. Tamela King had two daughters by a previous marriage, both of whom lived with her and Petitioner as of June 1, 1991.
4. Petitioner was employed by Respondent as a State Highway Patrol Trooper for more than 10 years. He served in the Patrol in various locations within the State. As of June 1, 1991, Petitioner and his wife Tamela King resided in Faison, North Carolina with his stepdaughters Candice Brooks Murphy (Brooks) and LaShea Murphy (Shea).
5. Prior to June 1, 1991, Petitioner and Tamela King had developed marital difficulties and were discussing a separation. They had agreed that Petitioner should obtain a separation agreement from his attorney. Petitioner's attorney prepared a separation agreement signed by Petitioner. Tamela King had picked up and brought home a copy of the separation agreement from Petitioner's attorney's office so that it could be reviewed by her attorney prior to her signing it.
6. On the night of May 31, 1991, Brooks Murphy participated in a dance recital. Tamela King's mother and father were in Petitioner's house on that day. Petitioner did not want to discuss the pending separation agreement with them so he did not attend the dance recital and did not stay in his house that night. Instead, he drove to the beach to fish and did not return to his house in Faison until sometime between 7:00 p.m. and 8:00 p.m. on June 1, 1991.

7. When Petitioner arrived home, Tamela King was asleep in the bed they shared in the master bedroom. Shea Murphy was asleep in her bedroom and Brooks Murphy was watching television in a room directly across the hall from the master bedroom where her mother was asleep. Neither Brooks' door nor the master bedroom door was completely closed.
8. Upon Petitioner's entering the master bedroom, Tamela King woke up. The couple engaged in some conversation about the proposed separation agreement. The parties were experiencing marital discord and the conversation was not light and pleasant. The conversation did not escalate into shouts. As Petitioner continued with the conversation, he discovered a note left on the dresser for him by his mother-in-law, Doris Marion. The note commented on the couple's marital problems and particularly expressed Doris Marion's disagreement with the separation agreement that Petitioner had obtained from his lawyer.
9. As the conversation was continuing, Petitioner was in the process of laying out his State Highway Patrol uniform for work the next morning. During this process, he handled his shirt, socks, shoes, pants, pens and other shirt paraphernalia, and his 9mm sidearm. Petitioner left the sidearm on top of or in the top drawer of the dresser which was near the foot of the bed and slightly to one side. While Petitioner was preparing his uniform and he and Tamela King were carrying on the conversation, Brooks Murphy came into, or started to come into, the master bedroom. She did not come all the way into the room and returned to her own room just across the hallway.
10. Petitioner got into the bed at about 8:00-8:15 p.m. Shortly thereafter, Tamela King got out of the bed and left the room.
11. When Tamela King left the master bedroom, she stopped by Brooks' room and instructed her to get into the car because they were going to leave. Tamela King did not say anything to Shea Murphy who was asleep in her bedroom at the time. Tamela King did not take Shea Murphy with her when she left the house. When Tamela King took her daughter Brooks Murphy and left the family home on the night of June 1, 1991, she forgot that she also had an older daughter, Shea Murphy, who was asleep in her bedroom. About an hour later Tamela King, in response to a question from Faison magistrate Verna Taylor, remembered that she had an older daughter named Shea Murphy who was still in the house asleep. At magistrate Taylor's suggestion, and having her memory refreshed, Tamela King returned to the King household and removed her daughter Shea Murphy.
12. Upon leaving the King household on the night of June 1, 1991 at about 8:15 p.m., Tamela King stopped at a pay phone and telephoned her attorney Carolyn Ingram at home. Carolyn Ingram advised her to call Faison magistrate Verna Taylor and to try to see her about getting a warrant. Tamela King told Carolyn Ingram that Petitioner had pointed his pistol at her during the conversation in the master bedroom saying "I ought to shoot you."
13. When Tamela King telephoned Verna Taylor, she was crying and upset. Verna Taylor instructed her to drive to magistrate Taylor's house, where she maintained an office. Upon Tamela King's arrival, magistrate Taylor observed that she was emotionally distraught but not fearful of Petitioner. Verna Taylor observed some redness and slight swelling on Tamela King's hand between her thumb and forefinger, the location where she reported to magistrate Taylor that Petitioner had pinched her. Tamela King also told magistrate Taylor that Petitioner did not strike her but had placed his fist against her jaw and applied some pressure.
14. After the initial interview, Tamela King left magistrate Taylor's presence to go outside with Faison policeman Wade Wheless for a smoke break. Brooks Murphy accompanied her mother during the outside smoke break. When Tamela King returned inside to magistrate Taylor, she informed the magistrate that Petitioner also had pointed his pistol at her and stated that he ought to shoot her.
15. After Tamela King, Wade Wheless, and Brooks Murphy came back inside Verna Taylor's house, magistrate Taylor asked Brooks Murphy what she had seen. Brooks stated that she had started

into the master bedroom but had gotten scared and returned to her own room. She did not state to magistrate Taylor that she had seen a gun.

16. After Tamela King went back to the King household and brought Shea Murphy out, she and Shea returned to magistrate Taylor's house. Tamela King told Shea during the drive back to the magistrate's house that Petitioner had pointed a gun at her and held his fist to her face. While at the magistrate's house, Shea asked her sister Brooks what she had seen or heard in the master bedroom while Petitioner and her mom were in it earlier in the evening. Brooks told Shea that she had heard the words "I ought to" but had not seen a gun. Shea Murphy and her stepmother Sandra Murphy later asked Brooks if she had seen a gun on the night of June 1, 1991 during the incident between Petitioner and her mother in the master bedroom. Brooks stated to Shea at that time that she had not seen a gun but that her mother Tamela King had told her to tell Doris Marion, Brooks' maternal grandmother, that she had seen a gun.
17. Magistrate Verna Taylor issued two warrants for Petitioner on the night of June 1, 1991. One warrant was for assault on a female and one was for communicating a threat. Petitioner was arrested at his Faison home on the night of June 1, 1991. After his arrest and while the household was vacant, Tamela King returned and packed her bags and departed Faison with her daughters.
18. Petitioner was tried and convicted upon his plea of not guilty in District Court for Duplin County on July 18, 1991 on charges of assault on a female and assault by pointing a gun. The charge of communicating a threat was dismissed by the district attorney. Petitioner gave timely notice of appeal to Superior Court for a trial de novo. Before the trial date in Superior Court, the district attorney took a voluntary dismissal of all charges against Petitioner. On August 5, 1991, Petitioner was dismissed from the State Highway Patrol on the basis of assault on a female and assault by pointing a gun.
19. Brooks Murphy did not testify in the criminal trial in Duplin County on July 18, 1991. Respondent did not interview either Brooks or Shea Murphy during its investigation of the events of June 1, 1991. Tamela King informed Lt. W. M. Autry, Internal Affairs Investigator for Respondent, that Brooks had come into the master bedroom while Petitioner had his pistol pointed at her. Respondent attempted to interview Brooks Murphy, a purported eyewitness, but was not allowed to do so by Brooks' mother Tamela King. Brooks Murphy has remained in the custody of Tamela King since June 1, 1991. Shea Murphy remained in the custody of Tamela King from June 1, 1991 until a court order awarded custody to her father, Milton Murphy, on November 17, 1991.
20. Brooks Murphy was called as a witness by Respondent in this contested case hearing. Brooks was nine years old on June 1, 1991 and had become ten years old by the time of this hearing. Brooks Murphy was very emotional and exhibited a high level of anxiety during her testimony. When she attempted to testify about whether she had seen Petitioner point a gun at her mother, she broke down and could not continue. After a bench conference and agreement between counsel, the hearing room was cleared of all persons except counsel for each party, the court reporter, and the administrative law judge. Tamela King resisted the request to leave the room. Upon being requested for a second time to leave the room, she stated loudly to her daughter, Brooks Murphy, that "I will not let them hurt you." This statement was not intended, nor did it have, a calming effect on Brooks Murphy.
21. Brooks Murphy did manage to testify after the hearing room was cleared and she had time to settle down. She was particularly emotionally sensitive when asked to give answers to questions about whether she had seen Petitioner pointing a gun at her mother.
22. Brooks Murphy's testimony in this contested case hearing cannot be regarded as trustworthy. The content of her testimony, her demeanor, and the inconsistent statements she made to Shea Murphy and to Verna Taylor, compel a finding that her testimony lacks the indicia of credibility necessary to support findings of fact based upon it.

23. Brooks Murphy, Shea Murphy, and Tamela King all share an opinion that Petitioner was a good father to the two girls and a good husband.
24. Tamela King was called as a material, critical witness by Respondent. Respondent's case against Petitioner is based upon the statements of Tamela King. As a witness Tamela King was evasive and nonresponsive in her answers. She tended to launch into speeches and to answer questions by discussing matters not inquired about by the question. She repeatedly had to be instructed to give responsive answers. The demeanor of Tamela King was not reflective of a person who understands the solemn obligations of the oath to tell the truth and proceeds to do so. The totality of her testimony and the demeanor she exhibited during its recitation compel a finding that her testimony lacks the credibility requisite to basing findings of fact upon it.
25. Seventeen (17) witnesses testified in this case in the form of reputation or opinion under G.S. 8C-1 Rule 608(a) as to the character of Tamela King for truthfulness or untruthfulness. Thirteen (13) of the seventeen witnesses gave reputation or opinion evidence that Tamela King is an untruthful person or that she is an untruthful person some of the time. Notable among those who so testified were JoAnn Wagoner, a personal confidant of Tamela King's mother, Doris Marion, and who has known Tamela King for 20 years or more; Doris Marion; and Tamela King's 13 year old daughter, Shea Murphy.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, I make the following conclusions of law.

1. The parties are properly before the Office of Administrative Hearings.
2. Respondent has the burden of showing by a preponderance of substantial evidence that Petitioner engaged in the conduct with which he has been charged and that such conduct constitutes just cause to terminate the constitutionally protected interest he holds in continued employment by Respondent. Respondent's evidence in this contested case does not carry the burden of showing by a preponderance of substantial evidence that on June 1, 1991 Petitioner assaulted his wife, Tamela King, by pointing a pistol at her, by pushing his fist against her jaw, or applying pressure to her hand.
3. Respondent has failed to establish by a preponderance of substantial evidence that Petitioner's testimony in defense of assault charges brought by Tamela King in Duplin County District Court on July 18, 1991 brought his personal and professional credibility into disrepute and impaired the reputation of the Highway Patrol.

RECOMMENDED DECISION

Based upon the foregoing findings of fact and conclusions of law, it is hereby recommended that Respondent's decision to terminate the employment of Petitioner Randy Quinton King on August 5, 1991 for improper personal conduct be reversed for lack of just cause. It is recommended that Petitioner be reinstated to the position he held prior to this termination; that he receive back pay from the date of his termination to the date of his reinstatement; that he receive reasonable attorney's fees and costs; and that he receive all other benefits to which he would have become entitled but for this involuntary separation on August 5, 1991.

ORDER

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, P.O. Drawer 27447, Raleigh, N.C. 27611-7447, in accordance with North Carolina General Statute 150B-36(b).

NOTICE

CONTESTED CASE DECISIONS

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this recommended decision and to present written arguments to those in the agency who will make the final decision. G.S. 150B-36(a).

The agency is required by G.S. 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings.

The agency that will make the final decision in this contested case is the State Personnel Commission.

This the 24th day of March, 1992

Beecher R. Gray
Administrative Law Judge

The North Carolina Administrative Code (NCAC) has four major subdivisions of rules. Two of these, titles and chapters, are mandatory. The major subdivision of the NCAC is the title. Each major department in the North Carolina executive branch of government has been assigned a title number. Titles are further broken down into chapters which shall be numerical in order. The other two, subchapters and sections are optional subdivisions to be used by agencies when appropriate.

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